Petition

81-990

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No .....

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY, TEXAS, ET AL.,

Petitioners,

v.

CARL THOMAS, SHERIFF,

Respondent,

v.

ROBERT COLLINS, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

I.

WHETHER DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES AGAINST COUNTY FUNDS AND THE COMMISSIONERS COURT AFTER APPROVING SETTLEMENT AGREEMENT THAT DID NOT PROVIDE FOR SAID AWARD AND INCORPORATING THE AGREEMENT IN THE JUDGMENT.

II.

WHETHER IN A 42 U.S.C. § 1983 CASE JUDGMENT FOR ATTORNEY FEES MAY BE AWARDED AGAINST THE COUNTY WHEN IT WAS NOT A PARTY TO THE SUIT OR SETTLEMENT AGREEMENT AND THE SHERIFF IS NOT SUED IN HIS OFFICIAL CAPACITY.

III.

WHETHER THE COUNTY, IF INJURY IS NOT CAUSED BY COUNTY/STATE POLICY, IS LIABLE FOR 42 U.S.C. § 1988 ATTORNEY'S FEE AWARD WHERE A TEXAS SHERIFF, WITH COMPLETE EMPLOYMENT PRACTICES AUTHORITY UNDER STATE LAW, VIOLATES DEPUTIES' RIGHTS UNDER 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Page
Issues Presented	i
Opinions Below	2
Grounds for Jurisdiction	3
Statutes, Rules and Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Granting Writ	10
Conclusion	28
Certificate of Service	29

Appendix:

Opinion of the United States Court of Appeals for the Fifth Circuit in *Collins v. Thomas*	A-1
Order of the Fifth Circuit Denying Rehearing En Banc	A-10
Order of the Fifth Circuit Denying Motion to Reconsider Denial of Motion for Rehearing En Banc	A-11
Judgment of the United States District Court for the Northern District of Texas, Dallas Division, filed June 27, 1979	B-1
Settlement Agreement, which was incorporated in the Judgment filed June 27, 1979	B-4
Order of the United States District Court for the Northern District of Texas, Dallas Division, filed August 29, 1979	C-1

TABLE OF CONTENTS — (Continued)

	Page
Order of the United States District Court for the Northern District of Texas, Dallas Division, filed on September 28, 1979	D-1
Order of the United States Court of Appeals for the Fifth Circuit dated October 2, 1981, denying motion to stay	E-1
Statutes, Rules and Constitutional Provisions	F-1
Motion of Assistant District Attorneys to Withdraw as Counsel for Defendant	G-1
Brief in Support of Motion of Assistant District Attorneys to Withdraw	G-4

TABLE OF AUTHORITIES

Cases

	Page
Adam Express Co. v. Beckwith, 100 Ohio St. 348, 126 N.E. 300 (1919)	12
Alexander v. Gardner-Denver Co., 415 U. S. 36, 94 S.Ct. 1011, 39 L.Ed2d 147 (1974)	12
Avery v. Midland County, Texas, 390 U. S. 474, 88 S.Ct. 1114 (1968)	22
Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981)	10
Bexar County v. Linden, 220 S.W. 761 (Tex. 1920)	20
Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977)	18
Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979)	14
Cia Anon Venezolana De Navigacion v. Harris, 374 F.2d 33 (5th Cir. 1967)	14
City of Houston v. Sam P. Wallace & Co., 585 S.W. 2d 669 (Tex. 1969)	18
Chicano Police Officer's Association v. Stover, 624 F.2d 127, 132 (10th Cir. 1980)	13
Corrigan v. California State Legislature, 263 F.2d 560 (9th Cir.), cert. den. 359 U. S. 980, 79 S.Ct. 901, 3 L.Ed.2d 929 (1959)	16
Dean v. Gladney, 621 F.2d 1331, (5th Cir. 1980), cert. den. 101 S.Ct. 1521	24, 25
DiMaggio v. O'Brien, 497 F.Supp. 870 (E.D.Pa. 1980)	24
Doe v. Sullivan, 472 F.Supp. 975 (W.D. Tex. 1979)	20
Elrod v. Burns, 65 S.Ct. 347 (1945)	26
Familias Unidas v. Briscoe, 619 F.2d 391, (5th Cir. 1980)	23
Faulhaber v. Dial Temp Air Conditioning Co., 362 S.W.2d 341 (CCA 1962, writ ref'd n.r.e.)	13

Cases

	Page
Ford Motor Co. v. Dept. of Treasury of State of Indiana, 323 U.S. 459, 65 S.Ct. 347 (1945)	16
Francia v. White, 594 F.2d 778 (10th Cir. 1979)	18
Green v. Stewart, 516 S.W.2d 133 (Tex. 1974)	23
General Motors Corporation v. Simmons, 558 S.W.2d 855 (Tex. 1977)	19
Hanrahan v. Hampton, 100 S.Ct. 1987 (1980), reh. den. 101 S.Ct. 33	19, 25
Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980)	14
Hutto v. Finney, 98 S.Ct. 2565 (1978), reh. den. 99 S.Ct. 1035)	8, 19, 21
J. Kahn & Co. v. Clark, 178 F.2d 111 (5th Cir. 1950)	13
Kedra v. City of Philadelphia, 454 F.Supp. 652 (E.D. Pa. 1978)	15, 16
Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980)	26
Meriwether v. Sherwood, 514 F.Supp. 433 (S.D.N.Y. 1981)	14
Miller v. Carson, 563 F.2d 741 (5th Cir. 1977)	8
Mine Safety Appliances Co. v. Forestall, 326 U. S. 371, 66 S.Ct. 219 (1945)	16
Monell v. Dept. of Soc. Services of the City of New York, 436 U. S. 658, 98 S.Ct. 2018 (1978)	10, 16, 17, 21, 24, 25, 26, 27
Monroe v. Pape, 365 U. S. 167, 81 S.Ct. 473 (1961)	10
Murray v. Harris, 112 S.W.2d 1091 (Tex. Civ. App.-1938), writ dism'd.	22

TABLE OF AUTHORITIES — (Continued)

Cases

	Page
Owens v. City of Independence, Mo., 589 F.2d 335 (1978), 438 U. S. 902	19
Quern v. Jordan, 99 S.Ct. 1139 (1979)	20
Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), cert. den. 101 S.Ct. 1392	19, 24
Schott Enterprises, Inc. v. Pepsico, Inc. 520 F.2d 1298 (6th Cir. 1975)	12
Scott v. Graham, 292 S.W.2d 324 (Tex. 1956)	16
Strozier v. General Motors Corporation (Lakewood Assembly Plant), 635 F.2d 424 (5th Cir. 1981)	13
Tarrant County v. Smith, 81 S.W.2d 537 (Tex.Civ. App.-1935)	22
Teague v. City of St. Louis, 615 F.2d 773 (8th Cir. 1980), cert. den. 101 S.Ct. 271	26
Thomas v. State of Louisiana, 534 F.2d 613 (5th Cir. 1976)	14, 15
Thompson v. Pechacek, 365 S.W.2d 297 (CCA-1963, no writ hist.)	13, 15
Tyler v. Woodson, 597 F.2d 643 (8th Cir. 1979)	26
Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981)	20
W. N. Connell v. B. L. McFarland Drilling Contractor, 347 S.W.2d 555 (Tex. 1961)	12
Wren v. Jones, 457 F.Supp. 234 (S.D. Ill. 1978), rev'd on other grounds 635 F.2d 1277 (7th Cir. 1980)	27

TABLE OF AUTHORITIES — (Continued)

Constitutions

	Page
United States Constitution:	
Eleventh Amendment	20
Texas Constitution:	
Article 3, Section 1	23
Article 5, Section 18	4, 18, 22, 23
Article 9, Section 3	22

Statutes

28 U.S.C. § 1254(1)	3
42 U.S.C. § 1983	3, 4, 5, 11, 19, 20, 24, 25, 26
42 U.S.C. § 1988	2, 3, 7, 11, 13, 14, 19, 24, 26
Vernon's Annotated Texas Statutes, Art. 3902	22
Vernon's Annotated Texas Statutes, Art. 6869	22, 25
H.J.R. No. 3, Acts 1969, 61st Legislature, p. 3230	22

Rules

F.R.C.P. 10(a)	16
F.R.C.P. 17(b)	16, 17
Tex. R.Civ. Pro. 33	17

Others

15 Tex.Jur.2d, Joinder of Parties, Sec. 168	17, 21
7 Wright and Miller, Federal Practices and Procedure,	
Section 1617	16
Section 1566	17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States

[1]The Petitioners are Dallas County, County Judge Garry Weber, County Commissioner Jim Jackson, County Commissioner Nancy Judy, County Commissioner Jim Tyson, and County Commissioner Roy Orr, comprising the Commissioners Court of Dallas County, the governing body of Dallas County, Texas. The Respondents are Robert Collins, Robert Knowles and Ross Bracey and Respondent Carl Thomas is the former Sheriff of Dallas County, Texas.

Court of Appeals for the Fifth Circuit, entered in the above cause on July 10, 1981, rehearing en banc denied August 31, 1981, and motion to reconsider denial of motion for rehearing en banc overruled October 2, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 649 F.2d 1203 (5th Cir. 1981). A copy of said opinion is included in Appendix A.

A copy of the Order of the Fifth Circuit denying rehearing en banc, as well as the Fifth Circuit's order denying the motion to reconsider denial of motion for rehearing en banc, are also included in Appendix A.

The Judgment of the United States District Court for the Northern District of Texas, Dallas Division, filed June 27, 1979, and the Settlement Agreement which was incorporated therein by reference, which said Judgment approved the settlement between the plaintiffs and Carl Thomas, Sheriff, and awarded attorney fees in the amount of $7,900.00 against Carl Thomas, "in his official capacity as Sheriff of Dallas County, pursuant to 42 U.S.C. § 1988, for which let execution issue if not paid promptly.", is included in Appendix B.

The Order of the United States District Court for the Northern District of Texas, Dallas Division, filed August 29, 1979, granting plaintiffs' motion ". . . to tax attorneys' fees and costs against County funds in the hands of defendant Carl Henry Thomas or from funds of the Dallas County Sheriff's Department. Alternatively, the Dallas County Commissioners Court are ordered to pay the plaintiffs' costs and attorney's fees from other general County funds, or to appear within 35 days from the date of the Order to show

cause why they should not be held in contempt for failing to do so", is included in Appendix C.

The Order of the United States District Court for the Northern District of Texas, Dallas Division, dated September 28, 1979, permitting Dallas County and the Commissioners Court to intervene as defendants for purposes of appealing the Court's order of August 29, 1979, and staying the Court's order provided a supersedeas bond in the amount of $1,000.00 is deposited with the Clerk of the District Court, is included in Appendix D.

The Order of the United States Court of Appeals for the Fifth Circuit, dated October 2, 1981, denying Petitioners' Motion to Stay is included in Appendix E.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on July 10, 1981, and Petitioners' Motion for Rehearing En Banc was denied August 31, 1981. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983

42 U.S.C. § 1988

Article 6869, V.A.T.S.

Article 1573, V.A.T.S.

Texas Constitution, Art. V, Sec. 18.

Rule 10(a), Federal Rules of Civil Procedure.

Rule 17(b), Federal Rules of Civil Procedure

Rule 33, Texas Rules of Civil Procedure

These statutes, rules and constitutional provisions are set forth in Appendix F.

STATEMENT OF THE CASE

The Original Complaint in this case was filed by Robert Collins, Robert Knowles and Ross Bracey, Respondents herein, on March 27, 1979, and was amended on June 13, 1979. The Respondents did not file the suit against Carl Thomas, Sheriff, in his official capacity as required by Rule 10(a), Fed. R.Civ. Pro., which requires the naming of all parties in the caption. Even though Texas law provides that a Texas county is not responsible to pay a judgment unless the county is a party and further provides that a county may sue and be sued in the name of the county, the suit was not filed against Dallas County or the Commissioners Court. According to the caption, the suit was filed only against "Carl Thomas, Sheriff" under 42 U.S.C. § 1983, and 42 U.S.C. § 1985 of the Civil Rights Act, and 18 U.S.C. § 1503.

The case was filed in the United States District Court for the Northern District of Texas, Dallas Division, claiming that Carl Thomas fired Respondent Collins because he allegedly gave "... truthful testimony, unfavorable to defendant, in Civil Action No. CA 3-77-1501-F, in the United States District Court, Dallas County, Texas, and that plaintiffs Bracey and Knowles refused to cooperate with the defendant in his retaliatory efforts against plaintiff Collins",

in violation of his constitutional and civil rights. Knowles and Bracey claimed they were fired because they refused to cooperate with Carl Thomas in his retaliatory efforts against Collins in violation of their civil rights under 42 U.S.C. § 1983.

The original answer was filed by Gerald Banks and Sue Lagarde, Assistant District Attorneys of Dallas County, Texas, but on May 4, 1979, said Assistant District Attorneys filed a motion to allow counsel to withdraw on the grounds that Article 332c, Sec. 3, V.A.T.S., provides, in part, that: "... if it reasonably appears that the act complained of may form the basis of the filing of a criminal charge against the official or employee, the County Commissioners Court shall employ and pay private counsel." A brief was filed on the same day in support thereof. Said motion and the brief are included in Appendix G. It was alleged in paragraph II that there was pending a criminal investigation by the Federal Bureau of Investigation of the "act complained of ... (that) may form the basis for the filing of a criminal charge against the defendant..." (i.e., Carl Thomas). It was further alleged in paragraph II of said brief that a possible conflict of interest on behalf of the District Attorney's office would exist and that said attorneys should be relieved and the case should proceed with Cecil Emerson, an attorney of the Sheriff's choice, representing him. Paragraph III of the brief alleged that it appeared that Gerald Banks and Sue Lagarde must withdraw since an investigator of the District Attorney's office and possibly another Assistant District Attorney may be called as a witness and that their testimony may be prejudicial to the client under Local Rule 13.8.

On May 11, 1979, the Court entered an order allowing the withdrawal of the said Assistant District Attorneys, Gerald

Banks and Sue Lagarde, as attorneys of record for the defendant Carl Thomas.

On May 18, 1979, the private attorney, Cecil Emerson, filed the defendant's amended answer which adopted and incorporated the allegations contained in the original answer which was filed on April 3, 1979.

In addition thereto, the defendant claimed in the amended answer an affirmative defense of qualified immunity and further the defense of absolute immunity, qualified immunity and the truth.

After considerable discovery, including depositions, the parties entered into a Settlement Agreement which was filed with the Court on June 25, 1979, (Appendix B), which provided for the reinstatement of plaintiffs, as provided in the agreement, and further provided that the claimants "... hereby release and forever discharge defendant of any and all claims or causes of action that were or could have been asserted in this cause of action, in consideration for which the defendant agrees to take the following action..." The said action included reinstatement, as mentioned hereinabove and as provided in the agreement. (Appendix B). The parties agreed that a fee of $7,900.00 would be a fair and reasonable fee for attorneys' services by the Law Offices of James C. Barber, attorneys for plaintiffs, but did not agree that the fee would be paid by the defendant and certainly did not agree that the fee and costs would be paid from county funds or by the Commissioners Court. Plaintiffs waived any claim for back pay and other damages and agreed to loyally and competently support the Sheriff in discharging his duties. The Court filed a judgment on June 27, 1979 (Appendix B), and made findings, including that "(3) The defendant has denied all wrongdoing in

this case and the parties have agreed that neither the negotiation and execution of the Settlement Agreement in this case nor the entry of the judgment, should constitute an admission of any kind by defendant that he has violated any law", and the terms of the Settlement Agreement were approved by the Court and incorporated by reference into the Court's findings. The Court then approved the settlement and made same a part of the Court's decree with the full force and effect as if fully set out therein and found that $7,900.00 constitutes a reasonable attorney's fee. All of this was provided for in the agreement, but the Court went beyond the agreement and found $918.25 in court costs and $7,900.00 attorney's fees should be paid "... by Carl Thomas, in his official capacity as Sheriff of Dallas County, pursuant to 42 U.S.C. § 1988, for which let execution issue if not paid promptly." The concluding paragraph of the judgment provided that "This judgment shall constitute a final disposition of all claims which have been or would have been asserted by plaintiffs in this action, except this Court hereby retains jurisdiction to enforce the terms of this decree."

On July 13, 1979, 18 days after the settlement agreement that did not require the payment of attorney fees was approved by the Court, plaintiff filed a "motion... to tax attorney fees and costs against County funds and for writ of execution and/or other necessary orders against defendant Carl Thomas, in his official capacity, said fees and costs to be paid from funds to which defendant has access as Sheriff of Dallas County." The plaintiff prayed in the alternative for other writs ordering payment by appropriate county officials and/or for a special tax levy for this purpose. "Alternatively and additionally plaintiffs pray for execution against defendant individually."

On August 29, 1979, the Court filed an order completely ignoring plaintiffs' request for execution against defendant Carl Thomas "individually" (Appendix C), but requiring Carl Thomas to pay the attorney fees from funds of the Dallas County Sheriff's Department or from funds under his control. Alternatively, the Dallas County Commissioners Court was ordered to pay plaintiffs' costs and attorneys fees from the general county fund or to appear within 35 days from the date of this order and show cause why they should not be held in contempt for failing to do so. That order went ahead to provide that "plaintiffs' attorneys having obtained permanent injunctive relief and reinstatement for plaintiffs, are entitled to attorneys' fees as attorneys for the prevailing parties." The Court cited *Hutto v. Finney*, supra. An examination of the Court's prior judgment and the agreement reveals that no injunctive relief was in fact granted, although reinstatement was agreed upon in lieu of other relief that was sought or could be sought. The Court's order further provided that, "... as in *Hutto*, the fact that Thomas was sued as Sheriff makes obvious the fact that attorneys' fees should come from county funds." The Court made no finding that the injury suffered by plaintiffs, if any, was "caused" by any County policy or custom. The Court cited *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977), a suit brought against a sheriff in his individual and official capacity. The Court's opinion ignored the fact that this case was only brought against "Carl Thomas, Sheriff", and did not otherwise purport to be brought against him in his official capacity as was done in *Miller v. Carson*, supra, involving a State whose counties have powers like home rule cities instead of limited powers as counties in Texas have. The Court further relied on S.Rep. 1101, 94th Cong., Second Session (1976), U.S. Code Cong. & Adm. News, 1976, pp. 5908, 5913, and noted that it was proper for the costs and

attorney fees to be paid from funds of the Dallas County Sheriff's Department or, alternatively, to order the Dallas County Commissioners Court to pay same from the general funds. The said order of the Court had the effect of completely exonerating Carl Thomas, the then Sheriff, from any financial responsibility in connection with the allegations of plaintiffs, although the Court made no findings as to whether or not the Sheriff was acting in reasonable good faith nor did the Court make any findings that the injuries were "caused" by either a state or county policy.

On September 17, 1979, the Commissioners Court of Dallas Count filed its motion to reconsider the order of August 29, 1979, or alternatively for leave to intervene for purposes of appeal. A brief was filed in support thereof. Plaintiffs responded to the motion on September 24, 1979, and on September 27, 1979, the County of Dallas and the Commissioners Court filed a motion to stay the order of August 29, 1979, pending an appeal.

On September 28, 1979, the Court filed its order (Appendix D) that the motion of the Commissioners Court to reconsider the August 29, 1979, order was denied and that Dallas County and the members of the Commissioners Court would be permitted to intervene as defendants for the purpose of appealing the Court's order of August 29, 1979, and that said last mentioned order would be stayed as to Dallas County pending appeal, provided the County posted a $1,000.00 supersedeas bond. On September 28, 1979, the notice of appeal by the County of Dallas and the Commissioners Court of Dallas County and its members in their official capacities as members of the Commissioners Court was filed. Supersedeas bond was posted October 1, 1979, as

required by the Court's order of September 28, 1979. The appeal was perfected to the Court of Appeals for the Fifth Circuit. By opinion dated July 10, 1981, 649 F.2d 1203, the judgment of the district court was affirmed. Judge John R. Brown, Circuit Judge, concurred on imposing the liability on the county (technically a non-party) for payment of the attorney's fees, as he did in his concurring opinion in *Barrett v. Thomas*, 649 F.2d 1193, but pointed out that:

> ". . . this illustrates how taxpayers have to foot the bill for flagrant, spectacular unconstitutional acts of an officer-agent of the entity. Indeed, the more crass the conduct the more costly it is to the treasury and innocent unoffending taxpayers. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed2d 611 (1978), in its restrictive rejection of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2nd 492 (1961), never contemplated such a result."

Motion for rehearing en banc was denied on August 31, 1981, and motion to reconsider denial of motion for rehearing en banc was denied October 2, 1981. The motion to stay was denied by order dated October 2, 1981.

In their original complaint, plaintiffs alleged that the court had jurisdiction under 28 U.S.C. § 1343(1) and (3).

REASONS FOR GRANTING WRIT

The Court should grant a review on writ of certiorari of the judgment of the United States Court of Appeals for the Fifth Circuit because:

1. The District Court erred in awarding attorney's fees against County funds and the Commissioners Court after approving settlement agreement that did not provide for said award and incorporating the agreement in the judgment.

2. Where 42 U.S.C. § 1983 case is not brought against the Sheriff in his official capacity, and the County is not a party to the agreement or judgment, no judgment can be entered against the County.

3. A Texas County (being a State agency with Eleventh Amendment immunity) cannot be held liable for attorney fees under 42 U.S.C. § 1988, where the alleged unconstitutional actions in a 42 U.S.C. § 1983 case, not involving a policy of the Commissioners Court, resulted from the alleged commission of a constitutional tort by one whose edicts and acts do not constitute policy of the State or County but, even if State policy was involved, the citizens of a particular county should not bear singular responsibility for same.

I. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES AGAINST COUNTY FUNDS AND THE COMMISSIONERS COURT AFTER APPROVING SETTLEMENT AGREEMENT THAT DID NOT PROVIDE FOR SAID AWARD AND INCORPORATING THE AGREEMENT IN THE JUDGMENT.

Although Dallas County and the Commissioners Court were not parties to the suit, the parties to that suit (the three plaintiffs and Carl Thomas, Sheriff, defendant) clearly entered into an unambiguous settlement agreement which provided that there was no admission of liability or wrongdoing of any kind by Carl Thomas. The agreement further provided that the plaintiffs "... release and forever discharge defendant of any and all claims or causes of action that were or could have been asserted in this cause of action, in consideration for which the defendant agrees to take the following action..." The action Thomas agreed to take was to reinstate the three plaintiffs at their former rank and to restore their fringe benefits and other items set out in the agreement. It was further agreed that he would not

harass them or retaliate and that $7,900.00 would be a reasonable fee for plaintiffs' attorney for services rendered to the plaintiffs. This agreement was entered into by the plaintiffs who had hired the attorney, but the agreement certainly did not provide that the defendant or the County would pay the attorney fees and that obviously was a claim that both was and could be asserted which the plaintiffs gave up in paragraph (4) of the settlement agreement. The plaintiffs waived any claim for backpay "...or any other damages." The plaintiffs also agreed to loyally and competently support the Sheriff in the discharge of his duties and to perform their own duties. The agreement is included in Appendix B.

RIGHT TO SETTLE AND RELEASE ALL CLAIMS.

It is well settled that litigants have a right to settle whatever claim either has against the other. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).

> "The parties had a right to settle whatever claims either had against the other and such settlement operates as a release. *Adam Express Co. v. Beckwith*, 100 Ohio St. 348,126 N.E. 300 (1919)" *Schott Enterprises, Inc. v. Pepsico, Inc.*, 520 F.2d 1298 (6th Cir. 1975).

The Texas law is in accord and the Supreme Court of Texas has held that:

> "Our courts will not continue to litigate a controversy that has ceased to exist and where the controversy between the parties has been settled." *W. N. Connell v. B. L. McFarland Drilling Contractor*, 347 S.W.2d 565,567 (Tex. 1961).

Even claims or causes of action on actionable fraud can be compromised and released under the Texas law, as well

as other claims, and "...the release, until set aside, does stand as a bar against Appellants' claim...." *Faulhaber v. Dial Temp Air Conditioning Co.*, 362 S.W.2d 341, 342, (C.C.A. - 1962, writ ref'd n.r.e.). Where a dispute "...is settled by an agreement which has been executed, the matter is and should be at an end." *Thompson v. Pechacek*, 365 S.W.2d 297, 212 (C.C.A. - 1963, no writ hist.).

An agreement of the parties settling a disputed liability is as conclusive of their rights as a judgment would be if it had been litigated instead of compromised. A mutual agreement for compromise is itself a valuable consideration." *J. Kahn & Co. v. Clark*, 178 F.2d 111 (5th Cir. 1950).

Even in discrimination cases, it is held that acceptance of a settlement bars a lawsuit where the remedy sought and settled was the remedy that was sought in the lawsuit. *Strozier v. General Motors Corporation (Lakewood Assembly Plant)*, 635 F.2d 424 (5th Cir. 1981).

It is clear that the plaintiff may give up 42 U.S.C. § 1988 attorney fees in a civil rights case by agreement. On this subject, the Tenth Circuit has held that:

> "Nevertheless, this is not one of those situations in which Congress has prohibited settlements covering payments of attorneys' fees. Therefore, plaintiffs can give up their statutory entitlement to fees as part of the settlement arrangement." *Chicano Police Officer's Association v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980).

Where a party enters into a settlement agreement to settle all issues in the cause, including claim for attorney fees, performance of the agreement bars further claim for attorney fees in a subsequent case on the same subject

matter. *Meriwether v. Sherwood*, 514 F.Supp. 433 (S.D.N.Y. 1981).

When arrived at and properly entered into, settlement agreements are "... generally viewed as binding, final and as conclusive of rights as a judgment." *Thomas v. State of Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976). As an example, the Court made a footnote reference to *Cia Anon Venezolana De Navigacion v. Harris*, 374 F.2d 33, 35 (5th Cir. 1967).

It has likewise been held that an award of attorney fees is not justified under 42 U.S.C. § 1988 where the plaintiff fails to recover on a civil rights claim but does recover on a pendent claim. *Haywood v. Ball*, 634 F.2d 740 (4th Cir. 1980).

It is not an abuse of the court's discretion to refuse to award attorney fees even where there has been a violation of private rights under the civil rights laws where the action occurred under circumstances indicative of broad violation of rights generally affecting the public. *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979). Neither the agreement nor the Court's judgment found any violation of any law, much less the civil rights act.

Since the parties entered a solemn agreement that the consideration set out in the agreement constituted a release and discharge of all claims or causes of action that were or could have been asserted, and since the agreement did not provide that the defendant would pay plaintiffs' attorney's fees, it was error for the district court, after approving the agreement and incorporating it in the judgment as part of the court's findings, to add to and extend the agreement so that a non-party to the suit, to-wit, Dallas County and the Commissioners Court, would be required to pay attorney fees or that said fees should be paid from county funds when even the parties to the agreement and suit made no

such agreement. The court's judgment of June 27, 1979, (Appendix B), clearly reflects that the court made absolutely no findings that any injury was caused by Carl Thomas, Sheriff. A fortiori, the court's judgment reflects that no finding was made that any injury was caused by a policy of Dallas County. Under these circumstances, the Court of Appeals should have reversed the district court judgment and rendered judgment that plaintiffs take nothing insofar as the claim for attorney fees and costs were concerned since the agreement constituted an accord and satisfaction. *Thompson v. Pechacek*, supra. The agreement, unless set aside, is binding, final and was conclusive of the rights of the parties, hence, the agreement is enforceable. *Thomas v. State of Louisiana*, supra.

II. WHERE 42 U.S.C. § 1983 SUIT IS NOT BROUGHT AGAINST THE SHERIFF IN HIS OFFICIAL CAPACITY AND COUNTY IS NOT A PARTY, NO JUDGMENT CAN BE ENTERED AGAINST THE COUNTY.

This suit was *not* brought against Carl Thomas, Sheriff, in his official capacity, but only against "Carl Thomas, Sheriff". Dallas County was not a party to the suit.

Respondents were not required to sue Carl Thomas in his official capacity. Indeed, it is not necessary to sue one in his official capacity for the purposes of the statutory requirement that a § 1983 defendant act "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory."

> "That requirement is addressed to the source of authority for defendant's conduct, and, so long as the state clothed the defendant with apparent authority to act, the requirement has been met." *Kedra v. City of Philadelphia*, 454 F. Supp. 652, 664 (E.D. Pa. 1978).

If the Respondents wanted to collect the judgment or some part thereof from the funds of Dallas County, they could have included Dallas County and the members of the Commissioners Court as defendants, but declined to do so. Rule 10(a) F.R.C.P., specifically requires the naming of all parties in the caption. *Kedra v. City of Philadelphia*, 454 F.Supp. 652 (E.D.Pa. 1978); *Corrigan v. California State Legislature*, 263 F.2d 560, 567 (9th Cir.), cert. denied, 359 U.S. 980, 79 S.Ct. 901, 3 L.Ed.2d 929 (1959). Even if the suit had been against Carl Thomas in his official capacity, ". . . if the official has acted outside his authority, he was not acting 'officially' and, therefore, only can be held personally liable for his conduct." *Kedra v. City of Philadelphia*, supra, at 664. Liability against local government may not be based on respondeat superior. *Monell v. Dept. of Soc. Serv. of the City of New York*, 98 S.Ct. 2018. Neither the County, the members of the Commissioners Court nor any person in the "official capacity" was named in the caption. When a party seeks by lawsuit to obtain funds from a governmental treasury, that governmental entity is an indispensable party since it is the governmental entity that has the interest in its funds. See *Mine Safety Appliances Co. v. Forestall*, 326 U.S. 371, 66 S.Ct. 219 (1945); *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459, 65 S.Ct. 347 (1945). Local governmental entities must also be joined if a party seeks to make a claim against that entity's funds. See *7 Wright and Miller*, FEDERAL PRACTICES AND PROCEDURE, Sec. 1617. This rule is in accord with Texas law. The Texas Supreme Court has held that suits affecting county funds must be brought against the county. *Scott v. Graham*, 292 S.W.2d 324 (Tex. 1956). This rule applies whenever the judgment would expend itself on the public treasury. Rule 17(b), Fed.R.Civ.Pro., provides, in part, that:

"Capacity to Sue or be Sued.

. . . . In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

"The third sentence of Rule 17(b), which directs that capacity be determined by the law of the State in which the district Court is held except as otherwise prescribed in this rule, applies to non-federal public officials. This portion of the rule preserves pre-1938 federal practice regarding the capacity of state officers . . . [T]he case 'involves the relations between the states themselves, with which Courts are incompetent to deal, and which are entrusted to other authorities.'" *Wright and Miller*, FEDERAL PRACTICE AND PROCEDURE, Section 1566 at 761.

When reference is made to Texas law concerning the capacities in which a county may be sued, Rule 33 of the Texas Rules of Civil Procedure provides,

"Suits by or against a county or incorporated city, town or village shall be in its corporate name."

If the purpose of a suit is to hold the county liable or in any way affect its interest, the county is a necessary party and must be joined. 15 Tex.Jur.2d, Joinder of Parties, Sec. 168. Official capacity suits have been said to be "only another way of pleading an action against an entity of which an officer is an agent. . ." *Monell v. Dept. of Soc. Serv.*, supra, note 55 at p. 2036.

Respondents' Complaint did not allege that the Commissioners Court or Dallas County had any policy or custom which would permit Sheriff Thomas, or anyone else, to deny anyone's constitutional or civil rights.

Even if Carl Thomas was acting in his official capacity, that does not keep him from being personally liable for

attorney fees where he fails to establish a good faith defense. *Francia v. White*, 594 F.2d 778 (10th Cir. 1979). The Court, however, declined to assess attorney fees against Carl Thomas personally. Likewise, even if it were alleged and proved that Carl Thomas was acting in his official capacity in violating the civil rights of the deputies, that still would not make the State or County liable for attorney fees in the absence of the plaintiffs' pleading and proving that he was acting in accordance with a policy, statute or usage of the government or that he was an officer whose edicts constituted policy. The Court incorporated the settlement agreement in the Court's findings which provided that there was no finding that Carl Thomas violated any law. The policy of Dallas County is set by the Commissioners Court in accordance with Article 5, Section 18, of the Texas Constitution. Texas being a State with 254 counties and a like number of county sheriffs, it has never been argued in any reported case that the sheriff is a high state official whose acts and edicts constitute state policy.

In view of the settlement agreement and since neither the County nor the Commissioners Court is responsible for the practices alleged in the complaint, said parties "should not be included in an award of attorney fees." *Brown v. Culpepper*, 559 F.2d 274, 278 (5th Cir. 1977). There was no adversary proceedings insofar as the County is concerned. The Respondents were represented by their own private attorney in making the agreement who had no authority and did not attempt to bind the governmental entity. This is comparable to that which arises when there is a "Mary Carter" agreement in a lawsuit. The courts have held that trials in which such agreements were made are not fair adversary proceedings. See *City of Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669 (Tex. 1969). The adversary nature and

integrity of the proceeding against the remaining defendants is undermined. See *General Motors Corporation v. Simmons*, 558 S.W.2d 855 (Tex. 1977). It is not fair to require a governmental entity to pay costs and attorney fees merely because the suit was against an employee or officer of the governmental entity. The head of the police department is not the policy making body. The City Council is. *Owens v. City of Independence, Mo.*, 589 F.2d 335 (1978), 438 U.S. 902. Likewise, it is the Commissioners Court who makes policy for the County, not the Sheriff. Where policies of the Commissioners Court do not "cause" the injury, the County is not liable for attorney fees. *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), cert den. 101 S.Ct. 1392; *Hanrahan v. Hampton*, 100 S.Ct. 1987 (1980), reh. den. 101 S.Ct. 33. At the time the agreement was made which was approved by the court's judgment, Carl Thomas was represented by his private attorney, as aforesaid, with no attorney representing the County's interest, hence, *Hutto v. Finney*, 98 S.Ct. 2565 (1978), reh. den. 99 S.Ct. 1035, where the Attorney General was representing the state's interest, is inapplicable.

III. A TEXAS COUNTY (BEING A STATE AGENCY WITH ELEVENTH AMENDMENT IMMUNITY) CANNOT BE HELD LIABLE FOR ATTORNEY FEES UNDER 42 U.S.C. § 1988, WHERE THE ALLEGED UNCONSTITUTIONAL ACTIONS IN A 42 U.S.C. § 1983 CASE, NOT INVOLVING A POLICY OF THE COMMISSIONERS COURT, RESULTED FROM THE ALLEGED COMMISSION OF A CONSTITUTIONAL TORT BY ONE WHOSE EDICTS AND ACTS DO NOT CONSTITUTE POLICY OF THE STATE OR COUNTY BUT, EVEN IF STATE POLICY WAS INVOLVED, THE CITIZENS OF A PARTICULAR COUNTY SHOULD NOT BEAR SINGULAR RESPONSIBILITY FOR SAME.

(1) COUNTY IS STATE AGENCY ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

A Texas county is legally and constitutionally an agency of the State and may differ from the nature of counties in other states. The Supreme Court of Texas has held that Texas counties are created "for the exercise of essentially State powers as distinguished from municipal powers; and, with their conferred powers having the nature of duties rather than privileges, existing as but agencies of the State for the effective discharge through local officers of the governmental obligations of the State. The use of the counties of the State as a means of government is a use by the State and for the State as a sovereignty." *Bexar County v. Linden*, 220 S.W. 761 (Tex. 1920). As was pointed out by the Court in *Bexar County*, supra, counties are to be distinguished from municipal corporations in Texas. The Court of Appeals for the Fifth Circuit en banc has recently withheld ruling on the question of Eleventh Amendment immunity for a county and remanded same to the trial court for further consideration because the trial court did not deal with the question that Texas counties "... unlike counties in most states and unlike municipalities in Texas..." are agencies or departments of the State. *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981), at page 306. Because a Texas county, as an integral part of the State, is endowed with sovereignty entitling it to immunity under the Eleventh Amendment to the United States Constitution, it has been held in *Doe v. Sullivan*, 472 F.Supp. 975 (W.D. Tex. 1979), that counties in Texas could not properly be sued for monetary relief under 42 U.S.C. § 1983.

The United States Supreme Court held in *Quern v. Jordan*, 99 S.Ct. 1139 (1979), that agencies and departments of a state are not subject to suit under 42 U.S.C. § 1983.

99 S.Ct. at 1145. The United States Supreme Court further pointed out in *Monell v. Dept. of Soc. Serv.*, supra, 690 note 54, that municipalities, as was involved in that case, were not governmental units which were considered part of the state for Eleventh Amendment purposes. Therefore, the city and city officials were named parties to the suit in *Monell*, supra. The County was not named a party in the suit at bar and neither was the Commissioners Court, the governing body. Even Carl Thomas was not sued in his official capacity. *Hutto v. Finney*, supra, is different and inapplicable because the state could not be joined as a party because of the Eleventh Amendment. The Texas law specifically provides that a county can be sued and must be sued if it is to be bound by a judgment. 15 Tex.Jur.2d, Joinder of Parties, Sec. 168. The Court noted in *Hutto v. Finney*, supra, in note 32, that:

> "The Attorney General is hardly in a position to argue that the fee awards should be borne not by the State but by individual officers who have relied on his office to protect their interests throughout the litigation."

As pointed out above, at the time the agreement, which is the basis of the judgment, was made and at all times thereafter, a private attorney was representing the Sheriff. Obviously, if attorney fees must be paid, the former sheriff would prefer the County pay some or all of same. Fortunately for the former sheriff, the private attorney has so far accomplished the latter at the taxpayers' expense.

In terming a Texas county a convenient agency for the State, the United States Supreme Court has held that:

> "It provides a convenient agency for the State to collect taxes, hold elections, administer judicial and peace-keeping functions, improve roads, and perform

other functions which are the ordinary duties of the State. The powers of the Commissioners Court, which is the governing body of Midland County, are strictly limited by statute and constitutional provisions."

Avery v. Midland County, Texas, 390 U.S. 474, at 502.

Article 9, Section 3, of the Texas Constitution at one time had a home rule provision for counties, but no home rule charter was ever adopted and the home rule provision of the Constitution was repealed August 5, 1969, by an election on that date which approved proposed H.J.R. No. 3, Acts 1969, 61st Legislature, page 3230. Article 5, Section 18, of the Texas Constitution provides that "... the Commissioners Court shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

(2) A TEXAS SHERIFF IS A STATE OFFICER IN EMPLOYMENT PRACTICES UNDER ARTICLE 6869, V.A.T.S.

Article 6869 is included in Appendix F and vests the sheriff with the employment authority for his deputies. The Commissioners Court is specifically denied the right to influence the selection of individual employees by other elected officers. Article 3902, V.A.T.S.

> "The Commissioners Court can limit the number and salaries of Sheriff deputies, but they have no power over the naming of the individuals to be appointed and are especially prohibited from attempting any such last-named influence." *Tarrant County v. Smith*, 81 S.W.2d 537, 538 (Tex.Civ.App. - 1935), writ ref'd.

It was held in *Murray v. Harris*, 112 S.W.2d 1091, (Tex. Civ. App. - 1938), writ dism., that:

> "The statute conferring upon the sheriff the power to appoint deputies fixes no definite term of office, but provides that the tenure shall be at the pleasure of the

sheriff, which is tantamount to a provision that both the appointment and tenure are discretionary with him." 112 S.W.2d at 1093.

While the head of a state agency is clearly a state officer, even a county official is *acting* as a state officer when acting under a state statute. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

(3) THE EDICTS AND ACTS OF A STATE OFFICER (SHERIFF) DO NOT CONSTITUTE EITHER STATE OR COUNTY POLICY.

One's status as an officer is determined by whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others. *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974). The Sheriff comes in this category since he alone has the authority to hire and fire. There is no indication in the Constitution or statutes that the Legislature has delegated the authority to the Sheriff of Dallas County, or the sheriff of any of the 254 counties in Texas, to make policy for the State of Texas. Art. 3, Sec. 1, of the Texas Constitution vests the legislative power of this State in "The Legislature of the State of Texas." The interpretive commentary, Texas Constitution, Vol.1, V.A.T.S., p.55, referring to the Legislature, states "its primary function is to formulate the policy of the State." It is clear that the Commissioners Court has been vested with "powers and jurisdiction over all county business." Texas Constitution, Art. 5, Sec. 18. Although the Commissioners Court has the jurisdiction for county business and county policy, they have no control over the employment practices of the Sheriff since it has been specifically denied them by statute.

When a county officer is acting under a state statute, it has been held that such officer is acting as a state officer. *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In regard to the County Judge's duties in *Briscoe*, supra, the Court observed that:

> "... his duty in implementing section 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility. Accordingly, under the standards set forth in *Monell* we hold that Medina County is not susceptible to liability under section 1983 for Judge Decker's issuance of the disclosure demands." 619 F.2d at 404.

In that case a county judge was acting under a state statute and the Court, therefore, held there was no liability on the county for attorney's fees under 42 U.S.C. § 1988. In doing so, the Court held that:

> "Of course, since we have held Medina County not to be susceptible to this section 1983 suit under *Monell* — because Judge Decker's actions did not implement or constitute an official county policy — the county will share no responsibility for plaintiff's fees and costs." 619 F.2d at 406.

There is no 42 U.S.C. § 1983 liability against defendants who did not "cause" an injury. *Rheuark v. Shaw*, supra.

Even a single council member has been held unable to set policy alone and, therefore, the borough was not liable under Section 1983. *DiMaggio v. O'Brien*, 497 F.Supp. 870 (E.D. Pa. 1980). The use of a questionable amount of force and the making of questionable arrests of beachgoers by a sheriff and his deputies did not constitute "official policy". *Dean v. Gladney*, 621 F.2d 1331 (5th Cir. 1980), cert. den. 101 S.Ct. 1521.

The Court held that the failure to award attorney fees against Brazoria County and the City of Clute was proper since the beachgoers were not prevailing parties as to the City and County in *Dean v. Gladney*, supra.

Since the agreement did not provide for recovery against Dallas County and Respondents were not the prevailing parties, it was error for the Court of Appeals to so hold. *Hanrahan v. Hampton*, supra.

Although this Court specifically held in *Monell*, supra, at 98 S.Ct. 2031, that:

> "Section 1 without question could be used to obtain a damage judgment against state or municipal *officials* who violated federal constitutional rights while acting under color of state law",

this Court specifically noted that:

> ". . . the language of Sec. 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless acting pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tort-feasor — or, in other words, a municipality cannot be held liable under Sec. 1983 on a respondeat superior theory." 98 S.Ct. at 2036.

There is insufficient nexus in this case between the employer and the alleged tortfeasor employee to impose liabilities on the employer. As has been pointed out herein, Dallas County had no control over Carl Thomas' employment practices because of Art. 6869, V.A.T.S., but, even if it did have the right to control him,

". . . the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support Sec. 1983 liability." *Monell*, supra, note 58, 96 S.Ct. at 2037.

"A local government may not be sued for an injury inflicted solely by its employees or agents." *Monell*, supra, 98 S.Ct. at 2038.

To hold otherwise could encourage instead of discourage public officials to violate a person's constitutional and civil rights. If a public official is allowed to violate civil rights of another and then require the County to pay the § 1983 damages and attorney's fees or the plaintiff's attorney's fees under 42 U.S.C. § 1988 in a § 1983 case seeking only equitable relief, such a holding, as the Court of Appeals made in this case, would permit a public official to discharge all employees of the opposite party who did not support the public official and then, if it were called to the Court's attention, the County, and not the Sheriff, would be required to pay the 42 U.S.C. § 1988 attorney's fee award. An unscrupulous public official would have a field day at public expense. The Civil Rights Act of 1871 was not intended to encourage this type of action. County officers will be more reluctant to violate the principles of *Elrod v. Burns*, 65 S.Ct. 347 (1945), when they face personal financial responsibility for such actions.

Tyler v. Woodson, 597 F.2d 643 (8th Cir. 1979), followed the holding in *Monell*, supra, that isolated acts by public officials are not enough to subject a municipality to § 1983 liabilities unless the acts are pursuant to some municipal policy.

Likewise, *Teague v. City of St. Louis*, 615 F.2d 773 (8th Cir. 1980), and *Landrigan v. City of Warwick*, 628 F.2d 736

(1st Cir. 1980), refused to hold the municipality liable where there was no showing that the damages were caused by the implementation of a municipal policy as distinguished from "acts" of a public official. Indeed, it has been held that personal motivations of primary actors preclude the imputation of their conduct to others. *Wren v. Jones*, 457 F.Supp. 234 (S.D. Ill., 1978), reversed on other grounds 635 F.2d 1277 (7th Cir. 1980).

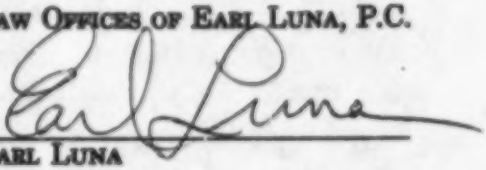
It is also insufficient for the Respondents to argue that they should have an attorney fee judgment against the County for insurance purposes in the event Carl Thomas personally is unable to respond since the Court refused to award attorney fees against Carl Thomas personally and Respondents failed to appeal from that judgment. In any event, the "insurance" and "spreading the risk" theory has been rejected by *Monell*, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

LAW OFFICES OF EARL LUNA, P.C.



EARL LUNA
2416 LTV Tower
Dallas, Texas 75201
(214) 747-1582

Attorney for Petitioners

PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for petitioners herein in all proceedings in which they have been involved as named parties in the Courts below.

I further state upon oath that upon the 24th day of November, 1981, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated, to-wit: Mr. James C. Barber, 318 Merchants State Bank Building, 5217 Ross Avenue, Dallas, Texas 75206, and Mr. Cecil Emerson, Suite 800, 8300 Douglas Ave., Dallas, Texas 75225.

Earl Luna

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said Earl Luna, this the 24th day of November, 1981.

Notary Public
Dallas County, Texas

Appendix

ROBERT COLLINS, ET AL.,

Plaintiffs-Appellees,

v.

CARL THOMAS, SHERIFF,

Defendant-Appellee,

v.

DALLAS COUNTY, ET AL.,

Intervenors-Appellants.

No. 79-3360

United States Court of Appeals,
Fifth Circuit.
Unit A

July 10, 1981

Civil rights suit involving a county sheriff's firing of certain employees was settled vindicating the asserted right. The United States District Court for the Northern District of Texas, Robert W. Porter, J., approved settlement and ordered an award of attorney fees to plaintiffs. Appeal was taken from award of attorney fees. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) award of attorney fees against sheriff in his official capacity lay against the county treasury even though the county was not named as a party in the plaintiffs' suits, and (2) to the extent that authorization of district court orders awarding

attorney fees conflicts with Texas' restrictions on execution of judgments against counties, federal statute must prevail over state law.

Affirmed.

Brown, Circuit Judge, filed a concurring opinion.

1. Civil Rights — 13.17

Prevailing plaintiffs in civil rights suits may recover their attorney fees unless special circumstances render the award unjust. 42 U.S.C.A. § 1988.

2. Federal Courts — 830

Attorney fee award given to prevailing plaintiff in civil rights suit may be overturned on appeal only if the Court of Appeals determines that it represents an abuse of discretion. 42 U.S.C.A. § 1988.

3. Civil Rights — 13.17

A party in civil rights suit need not win a judgment in order to prevail for purposes of determining attorney fees. 42 U.S.C.A. § 1988.

4. Civil Rights — 13.17

A civil rights plaintiff may prevail under statute allowing attorney fees to prevailing plaintiffs in civil rights suit by entering into a settlement vindicating the asserted civil right. 42 U.S.C.A. § 1988.

5. Civil Rights — 13.17

The award of attorney fees in civil rights suit against sheriff in his official capacity lay against the county treasury, even though the county was not named as a party in

the plaintiff's suit, in view of fact that sheriff's personnel decisions, which were at core of suit, constituted acts or edicts that may have fairly been said to have represented official county policy and there were no special circumstances rendering award of attorney fees against county unjust. 42 U.S.C.A. § 1988.

6. Federal Courts — 415

To the extent that authorization of Civil Rights Attorney's Fee Awards Act of 1976 of district court orders awarding attorney fees conflicts with Texas' restrictions on execution of judgments against counties, federal statute must prevail over state law. 42 U.S.C.A. § 1988.

Earl Luna, Thomas V. Murto, III, Dallas, Tex., for intervenors-appellants.

James C. Barber, Steven B. Thorpe, Dallas, Tex., for Collins, et al.

May, Herridge & Emerson, Cecil Emerson, Dallas, Tex., for Thomas.

Appeal from the United States District Court for the North District of Texas.

Before BROWN, THORNBERRY and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

This appeal was argued and is decided in tandem with *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), a related dispute over personnel decisions in the Dallas County Sheriff's Office during Sheriff Carl Thomas' regime. Sheriff Thomas fired Robert Collins, Robert Knowles and Ross Bracey from their supervisory positions with the Sheriff's

Office in March 1979. The three deputies joined in filing this lawsuit against Sheriff Thomas alleging that they were discharged in violation of their civil rights secured by 42 U.S.C. §§ 1983 & 1985. The plaintiffs original complaint charged that Thomas fired Collins for testifying unfavorably to the Sheriff in the *Barrett v. Thomas* trial. The complaint further alleged that Knowles and Bracey were discharged for their refusals to help Thomas retaliate against Collins for his testimony. After several weeks of heated discovery, the parties compromised their differences in a settlement agreement approved by the district court on June 25, 1979.

The settlement agreement provided for the reinstatement of each plaintiff to his former position with the Sheriff's Office and stipulated that "$7900.00 would be a fair and reasonable fee" for the services rendered by plaintiffs' counsel. The district court judgment approving the settlement accepted the stipulation and ordered that plaintiffs' counsel be paid $7900.00 as attorney's fees plus $918.25 in Court costs by Sheriff Thomas, in his official capacity and out of county funds under his control "pursuant to 42 *United States Code* § 1988, for which let execution issue if not paid promptly."

In this appeal, Dallas County raises two variants on the theme of § 1988 attorneys' fees awards against local governmental entities. First, is a county liable for a § 1988 fee award when it was not a named defendant? Second, assuming that a fee award does lie against the county treasury in these circumstances, what authority does a federal court wield, consistent with Fed.R.Civ.P. 69, to order county commissioners to pay a federal court judgment under pain of contempt? Later, in an August 1979 order, the district court specifically held Dallas County liable for the plaintiffs'

§ 1988 award and ordered Sheriff Thomas and the Dallas County Commissioners to pay the award from County funds allocated the Sheriff's Office or, in the alternative, from the County's general treasury. We affirm.

The County's Liability

[1, 2] Section 1988 entitles prevailing plaintiffs in civil rights suits[1] to recover their attorneys' fees unless special circumstances render the award unjust. *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978). The award may be overturned on appeal only if we determine that it represents an abuse of discretion.

[3, 4] Section 1988 authorizes awards to "prevailing parties," but a party need not win a judgment in order to prevail. A civil rights plaintiff may prevail under § 1988 by entering into a settlement vindicating the asserted civil right. *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980). Moreover, neither party challenges the quantum of the award fixed by the trial court. Thus, the focal point of this dispute is not the propriety of a § 1988 award or the quantum fixed by the trial court, but Dallas County's liability for the award.

[5] Dallas County disclaims liability for the § 1988 award because it denies responsibility for Sheriff Thomas' personnel decisions. But, as we have determined in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), Sheriff Thomas' personnel decisions constitute "acts or edicts [that] may fairly be said to represent official [County] policy." *Id.* at 1201, *quoting*

[1]Section 1988 applies to actions brought to enforce rights secured by 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986; by 20 U.S.C. §§ 1681 et seq.; and to actions brought by the United States government to enforce the provisions of 42 U.S.C. § 2000d or the Internal Revenue Code.

Monell v. New York City Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). The § 1988 award against Thomas in his official capacity lies against the Dallas County treasury even though Dallas County was not named as a party in the plaintiffs' suit. *Hutto v. Finney*, 437 U.S. 678, 699, 98 S.Ct. 2565, 2578, 57 L.Ed.2d 522 (1978).

We preceive no special circumstances rendering a § 1988 award against Dallas County unjust. In the early stages of this lawsuit, Sheriff Thomas was represented by the district attorney for Dallas County under the statutory requirement of Tex.Rev.Civ.Stat.Ann. art. 332c (Vernon Supp.1980). Had the County been named as a defendant, the district attorney would have functioned as defense counsel. Thomas substituted private counsel for the district attorney approximately six weeks prior to entering into the settlement agreement.[3] Nevertheless, the Sheriff continued to share the County's interests in disclaiming liability and in minimizing the amount of the plaintiffs' recovery. Dallas County charges by innuendo that Thomas and the plaintiffs colluded in the settlement to saddle the County with the § 1988a award. The record, however, discloses that the plaintiffs have diligently pursued Thomas' personal assets to satisfy their judgment. We cannot say that the trial court incorrectly applied the law or abused its discretion in holding Dallas County liable with Sheriff Thomas for the plaintiffs' attorneys' fees.

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[3] The Record indicates that the Dallas County District Attorney's Office withdrew as Thomas' counsel when a potential conflict of interest—stemming from the possibility that District Attorney's Office employees might be called to testify against Thomas in unrelated criminal proceedings—loomed on the horizon.

Execution Against the County

Appellant next asserts that the district court's order requiring Dallas County to pay the plaintiffs' attorney's fees from county funds oversteps the Fed.R.Civ.P. 69(a) prescription that execution of federal court judgments "shall be in accordance with the practice and procedure of the state in which the district court is held...." Citing Texas law forbidding execution on judgments against counties, Tex. Rev.Civ. Stat.Ann. art. 1575 (Vernon 1962), Dallas County maintains that a petition for a writ of mandamus in state district court is the exclusive avenue open to the plaintiffs for effectuating their § 1988 award against the county. *See National Surety Corp. v. Friendswood Independent School District*, 433 S.W.2d 690 (Tex.1968) (mandamus held to be the exclusive remedy for enforcing judgments against political subdivisions of the state).

We reject this restrictive view of the power of federal district courts to enforce their judgments against Texas counties. In *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), *rehearing granted on other grounds*, 636 F.2d 942 (1981), the State of Mississippi raised essentially the same arguments posed to this Court by Dallas County. Mississippi appealed a § 1988 award to the prevailing plaintiffs in litigation involving the State prison system. Noting that a Mississippi statute prohibited the satisfaction of judgments against the State in the absence of legislative authorization, Mississippi prison officials resisted payment of the § 1988 award on the ground that a federal district court had no authority to order state officials to make payment in violation of the State's statutory disbursement scheme. Writing for this Court, Judge Hill held, "It is now beyond dispute that a federal district court has the authority to order that attorney's fees be paid out of the state's treasury." *Id.* 616 F.2d at 1271.

[6] The district court's authority to award attorney's fees is established by § 1988 which is a Congressional enactment pursuant to Section 5 of the Fourteenth Amendment. To the extent that § 1988's authorization of district court orders awarding attorney's fees conflicts with Texas' restrictions on the execution of judgments against counties, the federal statute must prevail over state law. U.S.Const. Art. VI, cl. 2. Fed.R.Civ.P. 69(a) specifies that state execution procedures are to be followed "except that any statute of the United States governs to the extent that it is applicable." Fed.R.Civ.P. 70 provides further authorization for the district court's order requiring Dallas County to pay § 1988 award:

> If a judgment directs a party to ... perform any ... specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person.... The court may also in proper cases adjudge the party in contempt.

Quoted in *Gates v. Collier*, 616 F.2d at 1271 n.6.

The district court has ample authority to bind Dallas County by its order to require payment from County funds. The County may not successfully hide behind state procedural shields to avoid the consequences of a valid district court judgment effectuating an appropriate § 1988 award. *See Gates v. Collier*, 616 F.2d at 1270-72. *Cf. Gary W. v. State of Louisiana*, 441 F.Supp. 1121 (E.D. La. 1977), *aff'd.*, 601 F.2d 240 (5th Cir. 1979) (federal district court has authority to order State of Louisiana to pay special master's fees and expenses necessitated by state's recalcitrance in complying with federal court order).

The District Court has acted within the scope of its authority and has not abused its powers. Its judgment is

AFFIRMED.

JOHN R. BROWN, Circuit Judge, concurring:

I concur fully in the Court's opinion upholding the voluntary settlement and imposing liability on the county (technically a non-party) for payment of the attorney's fees. As I did in my special concurring opinion in *Barrett v. Thomas*, 649 F.2d 1193 (1981) I would point out that this illustrates how taxpayers have to foot the bill for flagrant, spectacular unconstitutional acts of an officer-agent of the entity. Indeed, the more crass the conduct the more costly it is to the treasury and innocent unoffending taxpayers. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), in its restrictive rejection of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed2d 492 (1961), never contemplated such a result.

U.S. Court of Appeals
FILED
Aug. 31, 1981
Gilbert F. Ganucheau
Clerk

IF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 79-3360

ROBERT COLLINS, ET AL.,
Plaintiffs-Appellees,
versus
CARL THOMAS, Sheriff,
Defendant-Appellee,
versus
DALLAS COUNTY, ET AL.,
Intervenors-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion July 10, 1981, 5 Cir., 198..., ——F.2d——).
(August 31, 1981)

ORDER

No member of the panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOHN S. WILLIAMS
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND
LOCAL RULE 17 FOR STAY
OF THE MANDATE.

U.S. Court of Appeals
FILED
Oct. 2, 1981
Gilbert F. Ganucheau
Clerk

IF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 79-3360

ROBERT COLLINS, ET AL.,
Plaintiffs-Appellees,

versus

CARL THOMAS, SHERIFF,
Defendant-Appellee,

versus

DALLAS COUNTY, ET AL.,
Intervenors-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before BROWN, THORNBERRY, and WILLIAMS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants to reconsider denial of petition for rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JERRE S. WILLIAMS
United States Circuit Judge

U.S. District Court
Northern District of Texas
FILED
June 27, 1979
Joseph McElroy, Jr., Clerk
By .....
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-79-0381-F

ROBERT COLLINS, ROBERT KNOWLES AND ROSS BRACEY,

Plaintiffs,

vs.

CARL THOMAS, SHERIFF,

Defendant.

JUDGMENT

On March 27, 1979, this suit was filed by Plaintiffs against Defendant alleging violation of their civil and constitutional rights, pursuant to 42 *United States Code*, Sections 1983 and 1985, 18 *United States Code*, Section 1503, and the First Amendment of the United States constitution. After an Amended Answer and motions to dismiss were filed by Defendant on May 11, 1979, and Plaintiffs filed an Amended Complaint on June 13, 1979, this case came on to be heard before the Court and a jury on June 25, 1979, not only on Plaintiffs' request for preliminary injunctive relief, but also for premanent injunctive relief and damages, on the merits.

However, the Parties having advised this Court that all issues in this case have been compromised and settled, and that they have entered into a settlement agreement dis-

pensing of all issues in this case, this Court makes the following findings of fact and conclusions of law:

(1) This Court has jurisdiction of the subject matter of this action under 42 *United States Code* Sections 1983 and 1985, and 28 *United States Code* Section 1343(i) and (3).

(2) The motions to dismiss of the Defendant in this case should be denied.

(3) The Defendant has denied all wrongdoing in this case, and the Parties have agreed that neither the negotiation and execution of the settlement agreement in this case, nor the entry of this Judgment, should constitute an admission of any kind by Defendant that he has violated any law.

(4) The terms of the settlement agreement between the Parties are hereby approved by the Court and incorporated by reference into these findings.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

(1) The terms of the compromise settlement agreement in this case, dated June ...., 1979, are hereby incorporated by reference into this Decree for all purposes, and are hereby adopted by reference for all purposes, and are expressly made a part of this Decree with the full force and effect thereof, as if fully set out in this Decree verbatim.

(2) The motions to dismiss filed by the Defendant are denied.

(3) The Court finds that the sum of $7,900.00 constitutes a fair and reasonable attorney's fee for the legal services performed by the Law Offices of James C. Barber, and the Law Offices of James C. Barber shall be paid $7,900.00 as attorney's fees plus $918.25 in Court costs by Carl Thomas,

in his official capacity as Sheriff of Dallas County, pursuant to 42 *United States Code*, Section 1988, for which let execution issue if not paid promptly.

(4) This Judgment shall constitute a final disposition of all claims which have been or would have been asserted by Plaintiffs in this action, except this Court hereby retains jurisdiction to enforce the terms of this Decree.

SIGNED AND ENTERED this 27th day of June, 1979.

United States District Judge

U.S. District Court
Northern District of Texas
FILED
June 25, 1979
Joseph McElroy, Jr., Clerk
By .....
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-79-0381-F

ROBERT COLLINS, ROBERT KNOWLES AND ROSS BRACEY,
Plaintiffs

VS.

CARL THOMAS, Sheriff
Defendant

SETTLEMENT AGREEMENT

WHEREAS, the Parties to this action are desirous of settling all issues involved in this action, they hereby enter into the following settlement agreement.

(1) The Parties agree that the Court has jurisdiction of all claims involved in this suit.

(2) The Parties agree that this Agreement shall be incorporated by reference into a final Judgment of this Court, and given full force and effect as if set out verbatim in that Judgment.

(3) It is understood and agreed between the parties that this settlement is the compromise of disputed claims and that the negotiation and execution of this settlement agreement by Sheriff Carl Thomas (hereinafter Defendant) is not an admission of liability on his part, or the admission of any wrongdoing.

(4) Plaintiffs Robert Collins, Robert Knowles and Ross Bracey (hereinafter Plaintiffs) hereby release and forever discharge Defendant of any and all claims or causes of action that were or could have been asserted in this cause of action, in consideration for which the Defendant agrees to take the following action:

(a) To reinstate all three Plaintiffs to their former ranks as of March 19, 1979, to wit: (i) Robert Collins to the rank of Director, (ii) Robert Knowles to the rank of Captain, with assignment as a Supervisor in the Civil Division of the Sheriff's Department, and (iii) Ross Bracey to the rank of Lieutenant with assignment as a Supervisor in the Bond and Warrant Division of the Sheriff's Department.

(b) To restore to all three Plaintiffs all fringe benefits they lost because of his discharging them on March 19, 1979, including vacation time accrued at the time of discharge; pension contributions; sick time; comp. time; major medical coverage; and to restore their seniority to the dates on which they were originally hired by the Department.

(c) To assign Robert Collins to the directorship currently held by Harry Weatherford, who is retiring as of the end of June, 1979. Provided, however, Robert Collins shall receive "front pay" at the rank of director until such time as he can resume the job responsibilities of this directorship, dating from the date of entry of the Decree herein.

(d) To assign Robert Knowles to a Captain position, outside the jail. Provided, if no Captain position is available as set out in this paragraph, Robert Knowles shall receive "front pay" effective as of the date of this Decree until such a captain position becomes available.

(e) To assign Ross Bracey a Lieutenant position, either as Lieutenant in charge of intake-release, his

former position, or outside the jail. Provided, if no lieutenant position is available as set out in this paragraph, Ross Bracey shall receive "front pay" effective as of the date of this decree until such a lieutenant position becomes available.

(f) To allow any of the Plaintiffs who are assigned to a job they have not previously performed and are not familiar with, including Collins in Weatherford's directorship, one hundred twenty (120) days to familiarize and acquaint themselves with their new jobs and duties during which time no adverse action will be taken against them solely due to their inexperience in the new position occupied by them.

(g) Defendant further agrees that neither he nor his agents shall unreasonably interfere with or restrict the job performance of Plaintiffs in any way, or harass or retaliate against them for filing this action against him, or for testifying truthfully in any future court proceeding to which they are subpoenaed.

Further, if Defendant contemplates any disciplinary action against Plaintiffs after the entry of this Decree, he agrees it will only be taken for good cause after notice to Plaintiffs of the charges against them, and an opportunity to present evidence on their behalf and to confront witnesses against them.

(h) Defendant agrees that a fee of $7,900.00 would be a fair and reasonable fee for attorney's services by the Law Offices of James C. Barber, Attorneys for Plaintiffs.

(5) Plaintiffs further agre to waive any claims for back pay in this case, or other damages.

(6) Plaintiffs finally agree to loyally and competently support the Sheriff in discharging his duties and to loyally and competently perform their duties as Dallas County Sheriff's deputies, including their duty to uphold and enforce the law, state and federal.

SIGN and AGREED to the 25th day of June, 1979.

CARL THOMAS

Carl Thomas, Sheriff

ROBERT COLLINS

Robert Collins

ROBERT KNOWLES

Robert Knowles

ROSS BRACEY

Ross Bracey

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared SHERIFF CARL THOMAS, ROBERT COLLINS, ROBERT KNOWLES, and ROSS BRACEY, known to me to be the persons whose names are subscribed to the foregoing Settlement Agreement and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this the 25th day of June, 1979.

JANIE KESINGER

Notary Public in and for
Dallas County, Texas

My Commission Expires:
August 19, 1979

U.S. District Court
Northern District of Texas
FILED
Aug. 29, 1979
Joseph McElroy, Jr., Clerk
By .....
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA3-79-0381-F

ROBERT COLLINS, ROBERT KNOWLES AND ROSS BRACHEY,

vs.

CARL THOMAS, SHERIFF.

ORDER

On the 29th day of August, 1979, came on to be heard the motion of Plaintiffs to tax attorneys' fees and costs against county funds and for writ of execution and/or other necessary orders. The Court having considered the motion and authorities, and the brief filed by the County of Dallas, and being of the opinion that the motion should be granted, ORDERS that the Defendant, Carl Henry Thomas, pay Plaintiffs' attorneys' fees, and costs, as previously set by this Court in the amounts of $7,900.00 and $918.25, from funds of the Dallas County Sheriff's Department, and that for such amounts Plaintiffs may have their execution from county funds under Defendant's control.

Alternatively, the Dallas County Commissioners are ordered to pay Plaintiffs' costs and attorneys' fees from other general county funds, or to appear within 35 days

from the date of this order and show cause why they should not be held in contempt for failing to do so.

The judgment in this case is now final for purposes of execution, and no stay of execution has been sought or is proper. Rule 62, Federal Rules of Civil Procedure; *U. S. v. Verlinsky*, 459 F.2d 1085 (5th Cir. 1972). Plaintiffs' attorneys having obtained permanent injunctive relief and reinstatement for Plaintiffs, are entitled to attorneys' fees as attorneys for the prevailing parties. In *Hutto v. Finney*, 437 U. S. 678 (1978) suit was brought against officials of the Arkansas Prison System attacking certain conditions therein. Neither the system itself nor the state were made parties to the suit. Nevertheless, the Court ordered payment of attorneys' fees to the prevailing plaintiffs to be paid from Department of Correction funds. The Supreme Court stated that since the Defendants were sued in their official capacity, it was obvious that the award would be paid from state funds.

Here, as in *Hutto*, the fact that Thomas was sued as sheriff makes obvious the fact that attorneys' fees should come from county funds. This view has been adopted by the Fifth Circuit specifically as applied to sheriffs. In *Miller v. Carson*, 563 F.2d 741 (5th Cir. 1977) a civil rights action was brought against a sheriff in his individual and official capacity. The Fifth Circuit affirmed the District Court's order directing payment of attorneys' fees from funds allocated to the sheriff's office. The circuit was guided by the report of the Senate Committee on the Judiciary on the Civil Rights Attorneys' Fees Awards Act, then Senate Bill 2278, which states that in cases similar to this one, "it is intended that the attorney's fees, like other items of cost, will be collected either directly from the official, in his

official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party)." Senate Report No. 1101, 94th Congress, 2nd Session 5 (1976), United States Code Congressional and Administrative News 1976, pp 5908, 5913. Therefore, it is proper to require the sheriff to pay the attorneys' fees and costs from funds of the Dallas County Sheriff's Department or, alternatively, to order the Dallas County Commissioners to pay plaintiffs' costs and attorneys' fees from other general county funds.

It is so ORDERED.

United States District Judge

DATE August 29, 1979

U.S. District Court
Northern District of Texas
FILED
Sept. 28, 1979
Joseph McElroy, Jr., Clerk
By .....
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NO. CA3-79-0381-F

ROBERT COLLINS, ROBERT KNOWLES AND ROSS BRACHEY,

vs.

CARL THOMAS, SHERIFF.

ORDER

Came on for consideration the motions of Dallas County, the Commissioners Court of Dallas County and the members thereof to reconsider this Court's Order of August 29, 1979, or in the alternative for leave to intervene for purposes of appeal, and to stay the Order of August 29, 1979, pending appeal, and the Court having considered said motions and being of the opinion that the alternative motions should be granted,

IT IS, THEREFORE, ORDERED that the motion to reconsider the Order of August 29, 1979, is denied.

IT IS FURTHER ORDERED that Dallas County, the Commissioners Court of Dallas County, and County Judge Garry Weber and Commissioners Jim Jackson, Nancy Judy,

Jim Tyson and Roy Orr, the members of the Commissioners Court, be permitted to intervene as defendants for the purpose of appealing the Court's Order of August 29, 1979.

IT IS FURTHER ORDERED that the Order of August 29, 1979, entered herein is stayed as to Dallas County, the Commissioners Court of Dallas County and the members of the Commissioners Court and county funds pending appeal, provided that a supersedeas bond in the amount of $1,000.00 is deposited with the Clerk of the District Court.

DATED: September 28, 1979.

ROBERT W. PORTER
United States District Judge

U.S. Court of Appeals
FILED
Oct. 2, 1981
Gilbert F. Ganucheau
Clerk

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Unit A

No. 79-3360

ROBERT COLLINS, ET AL,
Plaintiffs-Appellees,

versus

CARL THOMAS, Sheriff,
Defendant-Appellee,

versus

DALLAS COUNTY, ET AL,
Intervenors-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

The motion of appellants for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

J. S. WILLIAMS
United States District Judge

ARTICLE 5, SECTION 18, TEXAS CONSTITUTION

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

ARTICLE 6869, V.A.T.S.

Art. 6869. [7125] [4896] May appoint deputies, etc.

Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of

their principals; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the official oath, which shall be indorsed on his appointment, together with the certificate of the officer administering the same; and such appointment and oath shall be recorded in the office of the County Clerk and deposited in said office. The number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the Justice precinct in which is located the county site of such county, and one in each Justice precinct, and a list of these appointments shall be posted up in a conspicuous place in the Clerk's office. An indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff. Provided further, that if in the opinion of the Commissioners' Court fees of the sheriff's office are not sufficient to justify the payment of salaries of such deputies, the Commissioners' Court shall have the power to pay the same out of the General Fund of said county. Acts 1889, p. 23; G.L. vol. 9, p. 1051; Acts 1929, 41st Leg., 1st C.S., p. 283, ch. 113, § 1.

ARTICLE 1573, V.A.T.S.

Art. 1573. [1366] [790] [677] Suits against

No county shall be sued unless the claim upon which such suit is founded shall have first been presented to the commissioners court for allowance, and such court shall have neglected or refused to audit and allow the same, or any part thereof. P.D. 1045.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

As amended Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law

92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 10. Form of Pleadings

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Rule 17. Parties Plaintiff and Defendant; Capacity

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or to be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or to be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or to be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the

United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or to be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

TEXAS RULES OF CIVIL PROCEDURE

Rule 33. Suits By or Against Counties

Suits by or against a county or incorporated city, town or village shall be in its corporate name.

U. S. District Court
Northern District of Texas
FILED
May 4, 1979
Joseph McElroy, Jr., Clerk
By .....
Clerk

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAUSE NO. CA3-79-381-F

ROBERT COLLINS, ET AL,

vs.

CARL THOMAS, Sheriff,

MOTION TO ALLOW COUNSEL TO WITHDRAW

Now Comes Gerald Banks and Sue Lagarde, Attorneys of Record for Defendant Carl Thomas and files this Motion and would show as follows:

I.

The undersigned attorneys are both Assistant District Attorneys of Dallas County, Texas, and represent the Defendant by virtue of their position as Assistant District Attorneys and pursuant to Article 332c. V.A.T.S.

Art. 332c. Representation of county officials and employees by district county of private attorneys.

Section 1. In this Act, "nonpolitical entity" means any person, firm, corporation, association, or other private entity, and does not include the state, a political subdivision of the state, a city, a special district, or other public entity.

Sec. 2. In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall, subject to the provisions contained in Section 3, represent the official or employee of the county if the suit involves any act of the official or employee while in the performance of public duties.

Sec. 3. If additional counsel is necessary or proper for an official or employee provided legal counsel by Section 2 of this Act or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the county commissioners court shall employ and pay private counsel.

Sec. 4. Nothing in this Act requires a county official or employee to accept the legal counsel provided for him in this Act.

The Defendant has informed the present attorney of record and Henry Wade, the District Attorney of Dallas County, Texas, that he desires outside counsel to represent him herein pursuant to Art. 332c, Secs 3 & 4, V.A.T.S., due to a possible conflict of interest. Further, Defendant has stated to Gerald Banks and Sue Lagarde that he has retained the services of Cecil Emerson, Attorney at Law.

Wherefore, Gerald Banks and Sue Lagarde respectfully request the Court to allow them to withdraw as Attorneys of record herein.

Respectfully submitted,

Gerald A. Banks
Assistant District Attorney
Dallas County, Texas

SUE L. LAGARDE

Sue L. Lagarde
Assistant District Attorney
Dallas County, Texas

CERTIFICATE OF SERVICE

A copy of this Motion To Allow Counsel to Withdraw was served by mail on Plaintiff's Attorney of record on May 4th, 1979.

SUE L. LAGARDE

Sue L. Lagarde

U.S. District Court
Northern District of Texas
FILED
May 4, 1979
Joseph McElroy, Jr., Clerk
By .....
Deputy

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CAUSE NO. CA3-79-381-F

ROBERT COLLINS, ET AL,

vs.

CARL THOMAS, Sheriff,

BRIEF IN SUPPORT OF MOTION TO ALLOW COUNSEL TO WITHDRAW

I.

The present attorneys of record for Defendant Carl Thomas, Gerald Banks and Sue Lagarde, represent Defendant by virtue of statutory requirements and not as a result of the normal course of employment. See Art. 332c, V.A.T.S., which is set out more fully in Motion To Allow Counsel To Withdraw.

II.

Because there is a pending criminal investigation by the Federal Bureau of Investigation of the "act complained of . . . (that) may form the basis for the filing of a criminal

charge against the defendant . . .," Art. 332c (3) and due to a possible conflict of interest, details of which are set out below, Defendant Carl Thomas has requested that the present attorneys of record be relieved and that he proceed with an attorney of his choice, Cecil Emerson.

III.

Further, in light of Local Rule 13.8, it appears that Gerald Banks and Sue Lagarde are required to withdraw inasmuch as an Investigator for the District Attorney's Office and possibly another Assistant District Attorney may be called as a witness "other than on behalf of (the Defendant) . . . (and) it is apparent that (their) testimony . . . may be prejudicial to the client," See Local Rule 13.8.

Wherefore, premises considered, the present attorneys of record, Gerald Banks and Sue Lagarde, respectfully request that they be allowed to withdraw as attorneys of record herein.

Respectfully submitted,

SUE L. LAGARDE
Sue L. Lagarde

Gerald Banks

Amicus Brief

1

MOTION FILED
DEC 24 1981

No. 81-990

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

v.

CARL THOMAS, SHERIFF,
Respondent,

v.

ROBERT COLLINS, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, AND BRIEF IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OF COUNSEL:
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Attorneys for Amicus Curiae

No. 81-990

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

v.

CARL THOMAS, SHERIFF,
Respondent,

v.

ROBERT COLLINS, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, THE COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, a Texas non-profit corporation (hereinafter referred to as "*Amicus Curiae*"), and respectfully requests leave of the Court to file an *amicus* brief in support of Petitioners', Dallas County, et al., Application for Writ of Certiorari, and, as grounds therefor, would respectfully show as follows:

I.

Amicus curiae is a statewide association of Texas State Constitutional officers (i.e., county judges and commissioners) who serve as members of the governing bodies (i.e., county commissioners' courts) of State agencies (i.e., counties.) TEX. CONST. art. V, § 18. As such officers, the members of *amicus* are charged with the responsibility of providing funds to satisfy any liabilities on the part of their respective agencies which might arise under the decision of the Court of Appeals or, should certiorari be granted, under the decision of this Court in this case. TEX. REV. CIV. STAT. ANN. art. 689a-11 (Vernon 1964). Accordingly, the interests of *amicus* reflect the interests of the 254 Texas county governments and the fiscal interests of the more than 14 million persons who reside in these counties all across the State of Texas.

II.

Amicus seeks leave of Court to file its brief in support of the Petition for Certiorari in this case for two reasons. First, *amicus* believes that two of the questions of law raised by Petitioners, Dallas County, et al., are extremely critical in this rapidly developing area of federal law. These questions concern (1) the capacity of a Texas county-level officer to serve as a surrogate litigant for his county, and (2) the scope of liability that a Texas county may incur under 42 U.S.C. § 1983 as the result of conduct of officials who, under clearly established Texas law, are State officers, as well

as associated Eleventh Amendment problems. Both of these issues present questions of first impression for this Court. Neither this Court nor any Court of Appeals has addressed the relation of Rule 17(b) of the Federal Rules of Civil Procedure to actions brought in federal court under § 1983 against government officers "in their official capacity" or otherwise. Likewise, this Court has never addressed the special problems presented in cases involving local governments whose operating structures, as conceded by the Fifth Circuit, are "unique." *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

Unless *amicus*, whose proposed brief focuses exclusively on these two crucial questions, is granted leave to file its brief, however, this Court will have to decide whether to accept this case for review on the basis of the Petitioners' Brief for Certiorari. Petitioner's brief, though ably written, is forced to address three grounds of error in but seventeen pages of actual argument. *Amicus* respectfully submits that this Court would profit from granting *amicus* leave to file its brief so that the Court can have the benefit of extended argument on the novel and important issues raised by this case before a decision is made on the question of whether review should be granted.

III.

The second reason that this Court should grant this Motion for Leave is because the questions of governmental liability which rest at the very core of this case are inevitably intertwined with the welfare of the public fisc. Courts have

traditionally been especially sensitive to this concern, and this sensitivity has manifested itself in a greater willingness to permit the appearance of *amici curiae* in cases involving such issues. This attitude was well expressed by the Fourth Circuit Court of Appeals in a case in which an *amicus curiae* sought leave in order to dispute the validity of certain notes (scrip) issued by a state government. The Court of Appeals stated:

> The question [presented] . . . affects every taxpayer in the state. If this scrip be receivable for taxes, the debt of the state will largely be increased. Although this suit would have an immediate effect only on the parties in this case, still it may decide the general question, and so anticipate a final decision. The affidavits and arguments of the *amicus curiae* have been admitted and have received careful attention.

Robinson v. Lee, 122 F. 1010, 1011 (4th Cir. 1903), *aff'd.*, 196 U.S. 64 (1904).

The case at bar, no less than the *Robinson* case, also "affects every taxpayer in the state" of Texas. When a local government is held liable under § 1983 for the conduct of its officers and employees, it is the taxpayer who suffers. The significance of the impact of the Court of Appeals' decision, therefore, should allow this Motion to be favorably received by the Court so that it might receive additional information, useful to the Court in its decision on the question of certiorari, on the issues presented in this case which are fundamentally based upon the peculiarities of Texas law. *See, New England Patriots Football Club, Inc. v. University*

of Colorado, 592 F.2d 1196 (1st Cir. 1979) (function of *amicus* is to give information to the Court on some matter of law on which it might be uncertain); *accord*, *The Claveresk*, 264 F. 276 (2d Cir. 1920).

WHEREFORE, PREMISES CONSIDERED, *amicus* prays that its Motion for Leave to File Brief of *Amicus Curiae* be granted and that the Court accept for filing *Amicus'* Brief in Support of Petitioners', Dallas County, et al., Application for Writ of Certiorari.

Respectfully submitted,

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No. 81-990

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

v.

CARL THOMAS, SHERIFF,
Respondent,

v.

ROBERT COLLINS, ET AL.,
Respondents.

BRIEF OF AMICUS CURIAE, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TABLE OF CONTENTS

	Page
LIST OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. A TEXAS COUNTY CANNOT BE HELD LIABLE FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 1988, WHERE IT HAS NOT BEEN EXPRESSLY NAMED A PARTY DEFENDANT	5
A. FEDERAL LAW DIRECTS THAT THE ISSUE OF WHETHER A COUNTY-LEVEL OFFICER HAS THE CAPACITY TO REPRESENT HIS COUNTY AS A SURROGATE DEFENDANT MUST BE DETERMINED BY TEXAS LAW	5
B. TEXAS LAW PROHIBITS RECOVERY AGAINST A TEXAS COUNTY WHERE IT HAS NOT BEEN NAMED A PARTY DEFENDANT	7
C. MONELL AND ITS PROGENY DO NOT SUPERSEDE RULE 17(b), FEDERAL RULES OF CIVIL PROCEDURE	8
D. PLAINTIFFS CANNOT RECOVER ATTORNEYS' FEES UNDER § 1988 AGAINST A GOVERNMENTAL BODY WHERE THEIR PLEADINGS FAIL TO STATE A CLAIM AGAINST THE ENTITY UNDER § 1983	10

TABLE OF CONTENTS — (Continued)

Page

II. A TEXAS COUNTY CANNOT BE HELD LIABLE UNDER § 1983 FOR IMPERMISSIBLE EMPLOYMENT DECISIONS OF A SHERIFF 12

A. TEXAS SHERIFFS ARE STATE OFFICERS 12

B. IMPERMISSIBLE EMPLOYMENT DECISIONS OF A TEXAS SHERIFF MUST BE DEEMED TO BE IN EXECUTION OF OFFICIAL STATE POLICY, NOT COUNTY POLICY 13

1. Monell Rule Does Not Apply to Local Governments Which are Mere "Arms of the State." 13

2. If Any Governmental Entity Should Bear Liability for a Texas Sheriff's Conduct, It Should Be the Entire State of Texas, Not Dallas County 15

CONCLUSION 19

PROOF OF SERVICE 20

LIST OF AUTHORITIES

Page

Cases

Aetna Casualty & Surety Company v. Flowers, 330 U.S. 464 (1947) 8

Alabama v. Pugh, 438 U.S. 781 (1978) 7

Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966) *vacated on other grounds*, 390 U.S. 474 (1968) 15

Baxley v. Rutland, 409 F.Supp. 1249 (M.D. Ala. 1976) 6

Canales v. Laughlin, 147 Tex. 169, 214 S.W.2d 451 (1948) 14

Canister Co. v. Leahy, 182 F.2d 510 (3rd Cir. 1950) 9

Childress County v. Sachse, 310 S.W.2d 414 (Tex. Civ. App. — Amarillo 1958, writ ref'd. n.r.e., 158 Tex. 371, 312 S.W.2d 380) 7

Clarke v. Finley, 93 Tex. 171, 54 S.W. 343 (1899) 12

Conley v. Gibson, 355 U.S. 41 (1957) 11, 12

Connor v. Zackry, 117 S.W. 117 (Tex. Civ. App. 1909) 13

Dandridge v. Williams, 397 U.S. 471 (1970) 8

Davis v. Wildenthal, 241 S.W.2d 620 (Tex.Civ. App. — El Paso 1951, writ ref'd. n.r.e.) 7

Doe v. Sullivan, 472 F.Supp. 975 (W.D. Tex. 1979) 8, 13, 14

Ellis v. City of Chicago, 478 F.Supp. 333 (N.D. Ill. 1979) 12

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) 3, 15, 16, 18

Gozdanovic v. Civil Service Commission, 361 F.Supp. 504 (W.D. Pa. 1973) 11

Harris v. Nelson, 394 U.S. 286 1969) 9

Hoover v. United States, 253 F.2d 266 (10th Cir. 1958), *cert. denied*, 356 U.S. 960 10

LIST OF AUTHORITIES — (Continued)

	Page
Hutto v. Finney, 437 U.S. 678 (1978)	8
Jernigan v. Finley, 90 Tex. 205, 38 S.W. 25 (1896)	13
John R. Alley & Co., Inc. v. Federal National Bank, 124 F.2d 995 (10th Cir. 1942)	8
Koch v. Yunich, 533 F.2d 80 (2nd Cir. 1976)	11
Lombardi v. Peace, 259 F.Supp. 222 (S.D. N.Y. 1966)	7
Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000 (1941)	14
Moncrief v. Gurley, 609 S.W.2d 863 (Tex. Civ. App. — Ft. Worth 1980, writ ref'd. n.r.e.)	12
Monell v. Department of Social Services, 436 U.S. 638 (1978)	passim
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)	8
Murray v. Harris, 112 S.W.2d 1081 (Tex. Civ. App. — Amarillo 1938), writ dism'd.)	14
Owens v. City of Independence, Mo., 455 U.S. 622 (1980)	16
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959)	8
Ex parte Preston, 72 Tex. Crim. 77, 161 S.W. 115 (1913)	13
Quern v. Jordan, 440 U.S. 332 (1979)	7
Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980)	16
Roach v. Kligman, 412 F.Supp. 521 (E.D. Pa. 1976)	11
Robbins v. Limestone County, 114 Tex. 345, 268 S.W. 915 (1925)	14
Rodriguez v. Medical Arts Hospital, 437 F.2d 1203 (5th Cir. 1971)	14

LIST OF AUTHORITIES — (Continued)

	Page
Scott v. Graham, 156 Tex. 97, 292 S.W.2d 324 (1956)	7
Smith v. Ambrogio, 456 F.Supp. 1130 (D. Conn. 1978)	12
Trader v. Flat Distributors, 476 F.Supp. 1194 (D.Del. 1979)	11
Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980), *cert. denied*, 101 S.Ct. 577	12
United States v. Ballard, 322 U.S. 78 (1944)	8
Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981) (en banc)	8
Wiesenfeld v. New York, 474 F.Supp. 1141 (S.D. N.Y. 1979)	17
Wise v. Lipscomb, 437 U.S. 535 (1978)	8
Constitutions	
United States Constitution	
Eleventh Amendment	passim
Texas Constitution	
Article V, Section 23	12
Statutes	
United States Statutes	
42 U.S.C. § 1983	passim
42 U.S.C. § 1988	5, 10, 11, 19
Texas Statutes	
Vernon's Annotated Texas Statutes, Art. 6866	13
Vernon's Annotated Texas Statutes, Art. 6869	14, 15
Vernon's Annotated Texas Statutes, Arts. 6865 — 6877-4	13
Vernon's Texas Code of Criminal Procedure	13
Vernon's Texas Education Code, § 4.28	16

LIST OF AUTHORITIES — (Continued)

Page

Rules

Federal Rules of Civil Procedure, Rule 17(b) 6, 7, 8, 9

Texas Rules of Civil Procedure, Rule 33 ..... 7, 8

Others

Saranello and Griffiths, *Pleading Municipal Liability in Police Misconduct Actions*, 44 TEX. B.J. 1339 (Dec. 1981) 12

15 TEX. JUR. 2d, *Counties*, § 49 (1960 and 1981 Supp.) 13

5 Wright and Miller, Federal Practice and Procedure, § 1234 (1969) 10

6 Wright and Miller, Federal Practice and Procedure, § 1559 (1971) 6

13 Wright and Miller, Federal Practice and Procedure, § 3524 (1975) 8

No. 81-990

In The

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DALLAS COUNTY, TEXAS, ET AL.,
Petitioners,

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CARL THOMAS, SHERIFF,
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BRIEF OF AMICUS CURIAE, COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, THE COUNTY JUDGES AND COMMISSIONERS ASSOCIATION OF TEXAS, a Texas nonprofit corporation (hereinafter referred to as "*Amicus Curiae*"), and files this, its Brief in Support of Petitioners', Dallas County, et al., Application for Writ of Certiorari, and would respectfully show as follows:

INTEREST OF AMICUS CURIAE

Amicus curiae is a statewide association of Texas State Constitutional officers (i.e., county judges and commissioners) who serve as members of the governing bodies (i.e., county commissioners' courts) of State agencies (i.e., counties). TEX. CONST. art. V, § 18. As such officers, the members of *amicus* are charged with the responsibility of providing funds to satisfy any liabilities on the part of their respective agencies which might arise under the decision of the Court of Appeals or, should certiorari be granted, under the decision of this Court in this case. TEX. REV. CIV. STAT. ANN. art. 689a-11 (Vernon 1964).

The interest of *amicus* and its members, therefore, is the desire that the taxpayers of Texas counties not be held liable as the result of conduct of state officers over whom neither they nor their respective counties have any control.

This Brief demonstrates that the law already recognizes the legal principles behind this interest. While not directly adopting the statement of issues made by Petitioners, Dallas County, et al., this Brief supports the principles embraced by Petitioners' Issues No. II and III. Petitioners' Brief for Certiorari at i.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case presented by Petitioners, Dallas County, et al., in their Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

I.

Under Federal Law, Carl Thomas' and Dallas County's Capacity To Be Sued Is Determined by Texas Law. Rule 17(b), Federal Rules of Civil Procedure, states that whether

an individual defendant may be sued in a particular capacity shall be determined by the law of his domicile. This same Rule provides that the capacity of a governmental entity to be sued shall be determined by the law of the State in which the District Court sits. Since Sheriff Carl Thomas is a Texas domiciliary, and Dallas County is a division of the State of Texas, Texas law governs the issue of the defendant's capacity to be sued in this action.

Under Texas law, Carl Thomas Is Incapable of Serving as a Surrogate Defendant for Dallas County. The Fifth Circuit treated this action against "Carl Thomas, Sheriff" as one against Dallas County itself. The Texas Rules of Civil Procedure, adopted in this instance as surrogate federal law by the Federal Rules of Civil Procedure, prescribe that a suit against a Texas county must be brought directly against the county in its own name. A county-level officer in Texas is thus incapable of serving as the alter ego of his county in litigation brought against the county's interests.

***Monell* and Its Progeny Have Not Superseded Rule 17(b), Federal Rules of Civil Procedure.** It cannot be contended that by its decision in *Monell v. Department of Social Services*, the Supreme Court created an exception to Rule 17(b) holding that a government officer always has the capacity to act as a surrogate litigant for his governmental entity when he is sued in a civil rights case. This notion must be rejected because this Court has previously held that it cannot amend the Federal Rules of Civil Procedure by judicial decision.

Under Federal Law, the Plaintiff's Pleadings Fail To State a Claim Against Dallas County. The Federal Rules of Civil Procedure require plaintiffs to plead "a short and plain statement" of their claim sufficient to give the defendant "fair notice" of what the plaintiffs claim is and the

grounds upon which it rests. The plaintiffs in the instant case failed to comply with this requirement with respect to Dallas County. There was absolutely no pleading whatever linking Dallas County, as distinguished from Carl Thomas, to any ground of liability to the plaintiffs.

II.

Texas Sheriffs Are State, Not County, Officers. Well established Texas law holds squarely that a County Sheriff is not an officer of a county, but of the State of Texas itself. As an independently elected officer, all of his duties, powers and authority emanate from State, not local, law.

Texas Counties Are But Arms of the State and Do Not Come Within the Scope of § 1983 Liability of Local Governments As Defined in *Monell*. State law flatly holds Texas counties to be but mere local administrative units of the State of Texas. This principle has been recognized by federal courts and has already been used to grant Eleventh Amendment immunity status to these units of government. The scope of § 1983 liability for municipalities announced by this Court in *Monell v. Department of Social Services*, by it own express limitations, therefore does not apply to Texas counties.

If Any Government Is Responsible to the Plaintiffs, It Should Be the Entire State of Texas, Not Dallas County. The official policy of the State of Texas allowed Carl Thomas to make the personnel decisions challenged in the case at bar. Dallas County had absolutely no control over Sheriff Thomas' actions. Federal decisions, including authority decided by this Court, hold that Dallas County should not bear responsibility under these circumstances and that, if any governmental entity should be held accountable to the plaintiffs for Carl Thomas' conduct, it should be the entire State of Texas.

ARGUMENT

I. A TEXAS COUNTY CANNOT BE HELD LIABLE FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 1988, WHERE IT HAS NOT BEEN EXPRESSLY NAMED A PARTY DEFENDANT.

In the case at bar, the Court of Appeals affirmed the District Court's judgment against Carl Thomas "in his official capacity" and the lower court's order directing that payment of an award of the plaintiffs' attorney's fees be paid with funds possessed by Dallas County. These lower courts entered these judgments even though: (1) Carl Thomas was *not* sued "in his official capacity," (2) Dallas County was *not* named a party defendant to the lawsuit, and (3) the Plaintiffs did *not* plead or prove that Carl Thomas' actions were taken in execution of the official policy or custom of the county or that his conduct might fairly be said to represent the official policy or custom of Dallas County. As will be demonstrated in this brief, these holdings are fundamentally erroneous.

A. FEDERAL LAW DIRECTS THAT THE ISSUE OF WHETHER A COUNTY-LEVEL OFFICER HAS THE CAPACITY TO REPRESENT HIS COUNTY AS A SURROGATE DEFENDANT MUST BE DETERMINED BY TEXAS LAW.

Relying on its decision in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981, *petition for cert. filed*, No. 81-989), a companion case decided the same day as the instant case, the Fifth Circuit held that where a county-level officer of a Texas county is named as a party defendant, a judgment against that defendant may be satisfied with funds possessed by the county even though it was not named a defendant

in the action. Thus, the Court of Appeals impliedly held that a county-level officer has the capacity to act as a surrogate litigant on behalf of his county and/or a Texas county has the capacity to be sued through one of its officers. The Court necessarily made this implied holding on the issue of capacity, since "[g]enerally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and, typically, is determined without regard to the particular claim or defense being asserted." 6 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1559, at 727-28 (1971). In the case at bar, the Fifth Circuit implicitly determined that Sheriff Carl Thomas possessed sufficient "personal qualifications" to allow him "to litigate" on behalf of Dallas County, as well as himself.

This determination was simply wrong. Rule 17(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the District Court is held . . . .

FED. R. CIV. P. 17(b). Applying this rule to the instant case, one need look only to Texas law, since Texas is both the domicile of Sheriff Thomas and the State in which the District Court sat. State law must determine whether a governmental officer within that state has the capacity to serve as a surrogate litigant for his governmental entity in a federal court action. *Baxley v. Rutland*, 409 F.Supp. 1249 (M.D. Ala. 1976) (per Rives, Circuit Judge). Moreover,

Rule 17(b) has been employed routinely to resolve issues of capacity in civil rights actions by adoption of applicable state law. *See, e.g., Lombardi v. Peace*, 259 F.Supp. 222 (S.D. N.Y. 1966).

B. TEXAS LAW PROHIBITS RECOVERY AGAINST A TEXAS COUNTY WHERE IT HAS NOT BEEN NAMED A PARTY DEFENDANT.

When one looks to Texas law to determine whether an action may be maintained against a county through a lawsuit filed against one of more county-level officers, the answer is clear. Rule 33 of the Texas Rules of Civil Procedure flatly states, "Suits by or against a county or incorporated city, town or village shall be in its corporate name." TEX. R. CIV. P. 33. This rule of Texas procedure is firmly embedded and has been invoked repeatedly by Texas Courts to deny plaintiffs relief against a county where the suit was maintained only against county-level officers. *See, e.g., Scott v. Graham*, 156 Tex. 97, 292 S.W.2d 324 (1956); *Childress County v. Sachse*, 310 S.W.2d 414 (Tex. Civ. App. — Amarillo 1958, writ ref'd. n.r.e., 158 Tex. 371, 312 S.W.2d 380); *Davis v. Wildenthal*, 241 S.W.2d 620 (Tex.Civ. App. — El Paso 1951, writ ref'd. n.r.e.). Accordingly, the District Court and the Court of Appeals erred when they over-looked Federal Rule 17(b) and Texas Rule 33 and granted an award of attorneys' fees against Dallas County.[1]

[1] Although *amicus* notes that this Court has previously held that a governmental entity entitled to claim Eleventh Amendment immunity may not be sued directly in its own name in federal court, *see, e.g., Quern v. Jordan*, 440 U.S. 332 (1979); and *Alabama v. Pugh*, 438 U.S. 781 (1978), *amicus* submits that Rule 33 of the Texas Rules of Civil Procedure does not indicate that Texas counties are not entitled to this constitutional defense or that the State of Texas has consented to suits against its counties in federal court, thereby waiving the Eleventh Amendment defense.

C. MONELL AND ITS PROGENY DO NOT SUPERSEDE RULE 17(b), FEDERAL RULES OF CIVIL PROCEDURE.

It might be contended that this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978),

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Amicus submits that, under the criteria established by this Court and lower federal courts, Texas counties may properly claim Eleventh Amendment protection. *See Doe v. Sullivan*, 472 F.Supp. 975 (W.D. Tex. 1979); *compare, Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The Fifth Circuit itself has indicated that such protection may indeed be appropriate. *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc).

Rule 33, requiring suits against Texas counties to be brought against the governmental body itself, is a procedural rule promulgated for use in Texas courts by the Texas Supreme Court. A *procedural* rule fashioned by a court for use in state courts should not be deemed as a waiver of a *substantive* defense available in federal court. Indeed, Rule 17(b) is a procedural rule and cannot be construed, even by its adoption of a state procedural rule, to effect, abridge or modify the substantive rights of Dallas County under the Eleventh Amendment. *John R. Alley & Co., Inc. v. Federal National Bank*, 124 F.2d 995 (10th Cir. 1942). But even if Rule 17(b) could be construed as permitting an interpretation that Rule 33 of the Texas Rules had impliedly waived a county's Eleventh Amendment protection, it must be remembered that implied waivers of Eleventh Amendment protection are not favored. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *see also* cases cited in 13 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3524 at 79, n. 14 (1975). Of course, the applicability of this constitutional defense is not directly before the Court in the instant case, inasmuch as Dallas County, in a proper case, could be held liable for payment of a prevailing plaintiff's attorney's fees, notwithstanding the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678 (1978).

Amicus respectfully submits that a remand of this case to the Court of Appeals to decide these interrelated issues of capacity and constitutional immunity may be desirable so that this Court can have the benefit of the Fifth Circuit's views on these issues, which are necessarily dependent upon the intricacies of Texas law. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535 (1978); *Dandridge v. Williams*, 397 U.S. 471, 475, n. 6 (1970); *Aetna Casualty & Surety Company v. Flowers*, 330 U.S. 464, 468 (1947); *United States v. Ballard*, 322 U.S. 78, 88 (1944).

impliedly held that Rule 17(b) does not apply in civil rights actions against government officers who are named as defendants "in their official capacities." It could be argued that, in *Monell*, where there were individual defendants who had been sued in their "official capacities," the Court impliedly held that a government officer, when sued in such a capacity, *always* has the "capacity" to represent the interests of his government as a surrogate litigant, "at least where Eleventh Amendment considerations do not control analysis." *Monell v. Department of Social Services*, *supra*, at 690, n. 55.

Such a reading of *Monell* seems erroneous, however, because in that case this Court never referred to Rule 17(b) or the "capacity" of a defendant to be sued. Such an argument must be rejected because it seems virtually certain that, if this Supreme Court had intended in *Monell* to carve out an exception to one of the Federal Rules of Civil Procedure, the Court would have expressly announced such an holding. *See, Harris v. Nelson*, 394 U.S. 286, 298 (1969) (the Supreme Court has "no power to rewrite the Rules [of Civil Procedure] by judicial interpretations."); *see also*, *Canister Co. v. Leahy*, 182 F.2d 510, 514 (3rd Cir. 1950) (Federal Rules "must be adhered to."). In any event, even if this Court had made such a ruling, the plaintiffs in this case would not be able to come within its scope, inasmuch as the plaintiffs did *not* sue Carl Thomas "in his official capacity." On the contrary, the plaintiffs merely designated the office which the defendant held at the time this action was instituted. Relief against a governmental entity should be denied when a plaintiff, through his designation of the parties defendant, gives no clue that he seeks recovery from the entity itself. Moreover, again assuming *arguendo* that the *Monell* Court did make such an implied holding, such

a rule would not apply to this case because here "Eleventh Amendment considerations *do* . . . control analysis."

D. PLAINTIFFS CANNOT RECOVER ATTORNEYS' FEES UNDER § 1988 AGAINST A GOVERNMENTAL BODY WHERE THEIR PLEADINGS FAIL TO STATE A CLAIM AGAINST THE ENTITY UNDER § 1983.

Relief against a governmental entity must also be denied when a plaintiff gives no indication in his pleadings that he seeks recovery from the entity. In the instant case, the plaintiffs failed to plead or prove that the actions of Sheriff Thomas were taken in execution of official Dallas County policy or custom, or that Sheriff Thomas' acts could "fairly be said to represent" the official policy of the county, as required by *Monell* to establish liability against an entity. Given this failure, Dallas County has had no opportunity to assert any defenses to the plaintiffs' tardy claim upon it; therefore, no relief can be given the plaintiffs against Dallas County because there is no pleading on file connecting any conduct of Dallas County to the plaintiffs' damages. *Hoover v. U.S.*, 253 F.2d 266 (10th Cir. 1958), *cert. denied*, 356 U.S. 960; 5 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1234 (1969).

Moreover, the fact that the plaintiffs were represented by counsel in this case, as opposed to proceeding *pro se*, is also significant in viewing the defective pleadings. It has been held:

> [I]t is well established . . . that civil rights complaints, especially those drafted by experienced counsel, must set forth with specificity the acts of *each* defendant that are alleged to have violated the plaintiff's civil rights.

Trader v. Flat Distributors, 476 F.Supp. 1194 (D.Del. 1979) (emphasis added); *accord, Roach v. Kligman*, 412 F.Supp. 521 (E.D. Pa. 1976); *Gozdanovic v. Civil Service Commission*, 361 F.Supp. 504 (W.D. Pa. 1973); *c.f., Koch v. Yunich*, 533 F.2d 80 (2nd Cir. 1976) (held that complaint based on civil rights statutes must contain specific allegation of facts showing deprivation of civil rights). Indeed, where a plaintiff has chosen expressly to exclude a potential defendant in a civil rights action, that party cannot be said to be a party defendant. *Gozdanovic v. Civil Service Commission, supra.* This rule is nothing more than a logical extension of the well-established principle, laid down by this Court twenty-four years ago, that the Federal Rules of Civil Procedure require a plaintiff to plead " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The plaintiffs' failure to plead and prove that Sheriff Thomas' challenged actions were taken in execution of an official policy or custom of Dallas County or that he possessed sufficient authority so that his acts alone could represent such official policy is critical in reviewing the propriety of an award of attorneys' fees against the county. No one may be ordered to pay attorneys' fees under 42 U.S.C. § 1988 unless the conduct of such person or entity would subject them to liability directly under one of the statutes specifically enumerated in § 1988. 42 U.S.C. § 1988 (1970). In referring to the Civil Rights Attorney's Fee Award Act of 1976 (codified as 42 U.S.C. § 1988), this Court recognized this principle when it held that the Act "allows prevailing parties (in the discretion of the Court) in § 1983 suits to obtain attorneys' fees *from the losing parties.*" *Monell v. Department of Social Services, supra,* at 698-99 (emphasis

added). Yet, although the plaintiffs pled and proved a § 1983 claim against Carl Thomas, the county cannot be held vicariously liable under § 1983 on a theory of *respondeat superior* on the basis of this pleading and evidence. *Id.* Inasmuch as the plaintiffs' pleadings and proof failed to give Dallas County *any* notice of the plaintiffs' claim against it, the Fifth Circuit erred as a matter of law when it affirmed the District Court's award of attorneys' fees running against the entity itself. *Conley v. Gibson, supra; see also, Smith v. Ambrogio,* 456 F.Supp. 1130, 1134, n. 3 (D. Conn. 1978) (held *Monell* applies to a municipal defendant with a single challenged official policy "as long as the *pleaded* facts support the inference that unconstitutional action was taken... pursuant to such policy"), quoted in *Turpin v. Mailet,* 619 F.2d 196, 202 (2nd Cir. 1980), *cert. denied* 101 S.Ct. 577 (emphasis added); *Ellis v. City of Chicago,* 478 F.Supp. 333 (N.D. Ill. 1979); *see generally,* Saranello and Griffiths, *Pleading Municipal Liability in Police Misconduct Actions,* 44 TEX. B.J. 1339 (Dec. 1981).

II. A TEXAS COUNTY CANNOT BE HELD LIABLE UNDER § 1983 FOR IMPERMISSIBLE EMPLOYMENT DECISIONS OF A SHERIFF.

A. TEXAS SHERIFFS ARE STATE OFFICERS.

More more than eighty years, Texas law has held Sheriffs to be officers of the State itself, and not county officers. *Clarke v. Finley,* 93 Tex. 171, 54 S.W. 343 (1899). The office is created by the State Constitution. TEX. CONST. Art. V. § 23. The office cannot be modified or abolished by the will of the local electorate in any individual county, save by statewide referendum. *C.f., Moncrief v. Gurley,* 609 S.W.2d 863, 866 (Tex. Civ. App. — Ft. Worth 1980, writ ref'd.

n.r.e.) (Massey, C.J., concurring). The duties and powers of the office are all specifically established by state statute and not by local county ordinances. TEX. REV. CIV. STAT. ANN. arts. 6865 — 6877-4 (Vernon 1960 and Vernon Supp. 1980-81); *see generally* TEX. CRIM. PRO. CODE ANN. Indeed, a state statute, not any local ordinance, requires a Sheriff to post a bond conditioned on his performance of official duties and good behavior, and this bond is payable to the Governor of Texas, not to any locally elected official. TEX. REV. CIV. STAT. ANN. art. 6866 (Vernon 1960).

Nor is the Sheriff's status as a state officer unique among county-level officers in Texas. Other such officers have long been recognized as state officers as well. *See, e.g., Fears v. Nacogdoches County*, 71 Tex. 337, 9 S.W. 265, 266 (1888) (Justice of the Peace "though sometimes called a county or precinct officer, . . . is an officer of the State, and not for the County."); *Jernigan v. Finley*, 90 Tex. 205, 38 S.W. 25 (1896) (County Treasurer); *accord, Connor v. Zackry*, 117 S.W. 117 (Tex. Civ. App. 1909); *see generally, Ex parte Preston*, 72 Tex. Crim. 77, 161 S.W. 115 (1913); 15 TEX. JUR. 2d, *Counties* § 49 (1960 and 1981 Supp.). The status of a Texas Sheriff as a State officer has already been acknowledged by the federal judiciary. *Doe v. Sullivan, supra.*

B. IMPERMISSIBLE EMPLOYMENT DECISIONS OF A TEXAS SHERIFF MUST BE DEEMED TO BE IN EXECUTION OF OFFICIAL STATE POLICY, NOT COUNTY POLICY.

1. *Monell* Rule Does Not Apply to Local Governments Which Are Mere "Arms of the State."

Nowhere is the official policy of the State of Texas more clearly expressed than in the general statutes enacted by

the Texas Legislature. Article 6869, Texas Revised Civil Statutes, vests virtually unbridled discretion in every Sheriff to employ and discharge deputies at "the pleasure of the Sheriff." It must be said, therefore, that the official policy of the State of Texas is to give almost total authority over personnel decisions concerning county deputy sheriffs to the Sheriff elected in that county. *Murray v. Harris*, 112 S.W.2d 1081 (Tex. Civ. App. — Amarillo 1938, writ dism'd.).

Monell, of course, established that a local government *not entitled to claim Eleventh Amendment immunity* can be held liable *only* where one of its officers, employees or agents deprives an individual of his federal rights, while executing an official policy or custom *of the local government itself*, or where the impermissible conduct is that of someone whose acts may fairly be said to represent the official policy or custom *of the local government. Monell v. Department of Social Services, supra.*

It is submitted that, under this rule, Dallas County cannot be held liable for the conduct of Sheriff Carl Thomas for two reasons. First, Dallas County is but on arm of the State of Texas and is, therefore, entitled to Eleventh Amendment immunity. *Doe v. Sullivan, supra,; c.f., Rodriguez v. Medical Arts Hospital*, 437 F.2d 1203, 1204 (5th Cir. 1971) (held that "in Texas, counties are political subdivision of the State operating solely and exclusively as a governmental agency" of the State); *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948) (counties have no powers other than those expressly conferred on them by Texas Constitution and statutes); *Miller v. El Paso County*, 136 Tex. 370, 150 S.W.2d 1000 (1941) (Texas county is but "mere" division of the State and can only perform governmental functions); *Robbins v. Limestone County*, 114 Tex. 345, 268 S.W. 915,

919 (1925) (held that State of Texas actually owns all property in possession of counties, and Legislature "may exercise dominion and control over it without the consent of the county and without compensating the county for it"); *see also, Avery v. Midland County*, 406 S.W.2d 422 (Tex. 1966), *vacated on other grounds*, 390 U.S. 474 (1968). Accordingly, the rule of liability announced in *Monell* expressly does not apply to Dallas County. *Monell v. Department of Social Services, supra*, n.54 at 690.

2. If Any Governmental Entity Should Bear Liability for a Texas Sheriff's Conduct, It Should Be the Entire State of Texas, Not Dallas County.

The second reason Dallas County cannot be held liable under § 1983 for the conduct of Sheriff Thomas in the instant case is that his conduct as a state officer in no manner executed the official policy or custom of Dallas County. Even if the Sheriff acted improperly in making personnel decisions with regard to the plaintiffs, such conduct was taken pursuant to the official policy of the State of Texas, which was to give the Sheriff the widest possible authority in personnel matters. *See, Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). Therefore, because the county could not have prevented Sheriff Thomas' actions, taken under the authority of Article 6869, Texas Revised Civil Statutes, "the citizens of . . . [Dallas] county should not bear singular responsibility" for his conduct. *Id.* at 404. Indeed, if any governmental entity should be called upon to bear responsibility for Sheriff Thomas' acts, it should be the entire State of Texas, whose unbridled grant of statutory power to Sheriff Thomas may fairly be said to have "caused" any damages the plaintiffs may have suffered, inasmuch as Article 6869 permitted Carl Thomas to take

the actions he did. Indeed, as this Supreme Court has held, "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owens v. City of Independence, Mo.*, 445 U.S. 622, 654 (1980). The converse of this principle is, of course, that elemental notions of fairness require that a party whose conduct causes no damage should not be called upon to bear any loss. It is respectfully submitted that Dallas County caused no injuries to the plaintiffs in this case.

The distinction between liability being imposed on an official under § 1983 and liability being imposed on his governmental entity as the result of his conduct has been recognized by numerous courts since *Monell*. For example, in *Familias Unidas v. Briscoe, supra.*, a Texas county judge had exercised his power under § 4.28 of the Texas Education Code, which vested in county judges the authority to require any organization deemed to be interfering with public school operations to disclose its membership. Although the Fifth Circuit struck down the statute as being unconstitutional, the Court held that the judge's conduct did not "represent the official policy of Medina County" because he was executing State policy. *Id.* at 404.

The distinction was again recognized by the Fifth Circuit in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980). In *Rheuark*, three criminal defendants who had been convicted in state district court in Dallas County and who were incarcerated pending appeal brought a § 1983 action against the county, its commissioners, the state district judge who had presided over their trials and the court reporter who had reported the trial. The plaintiffs alleged that they were being denied their liberty because of lengthy delays in the transcription of their trials. The delays were caused by a

shortage of court reporters, and the county commissioners had written the district judges in the county requesting them to curtail the appointment of additional reporters, even though the commissioners were aware of lengthy delays. Texas law requires a county to pay the court reporters' salaries, but state district judges have independent power to appoint such reporters as are necessary and to set their salaries. The Fifth Circuit concluded that, notwithstanding the commissioners' action, the defendant state district judge was the party chiefly responsible for the plaintiffs' plight, since he had not appointed additional reporters. The Court, therefore, concluded that Dallas County, which had no authority over the district judge's appointments, was not liable.

The distinction was also recognized in *Wiesenfeld v. New York*, 474 F.Supp. 1141 (S.D. N.Y. 1979). In *Wiesenfeld*, the plaintiffs' complaint arose because their husband and father had been ordered to increase his weekly child support payments in favor of a child by his first wife by a State Family Court of the State of New York in a proceeding of which the plaintiffs had not been given notice. The plaintiffs sued the State of New York, the trial judges involved in the issuance and enforcement of the support orders and the City of New York, whose mayor had appointed the defendant judges of the state courts pursuant to New York State law. The District Court detailed how the actions of the defendant judges had been taken pursuant to their authority under State law and dismissed the claim against the City, noting that its only nexus with the plaintiffs was the fact that its mayor had merely appointed the State officials whose complained of acts were taken pursuant to state law. To find the City liable under these circumstances, the Court held, would be a finding of liability

solely on the basis of *respondeat superior*, which was proscribed by *Monell.*

Clearly, the instant case is no different than *Familias Unidas*, *Rheuark* and *Wiesenfeld* with respect to the absence of any liability on the part of the local government under § 1983. Even though the voters of the local county had elected the county judge in *Familias Unidas* and the district judge in *Rheuark* and even though the voters of the City of New York had elected the City's mayor, who in turn appointed the state trial judges in *Wiesenfeld*, none of the local entities were held liable for any wrongful conduct in these cases. The reason for these holdings is that the officials whose acts were challenged had simply been executing state laws and policies at the time their questioned conduct occurred. This is precisely the situation in the case at bar. To impose liability on Dallas County in the instant case is to establish liability simply because the county employed a tortfeasor. Such liability cannot be imposed. *Monell v. Department of Social Services, supra.*

CONCLUSION

Amicus curiae prays that the Judgment of the Court of Appeals imposing liability upon Dallas County under 42 U.S.C. §§ 1983 and 1988 be reversed.

Respectfully submitted,

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STATE OF TEXAS }
COUNTY OF TARRANT }

BEFORE ME, the undersigned Notary Public in and for Tarrant County, Texas, on this day personally appeared JEFF R. BOGGESS, who, being by me duly sworn, upon oath stated:

I, JEFF R. BOGGESS, on the ..... day of December, 1981, in compliance with Rule 28(3) and (5), Rules of the Supreme Court of the United States, served copies of the foregoing Motion for Leave to File Brief of Amicus Curiae, County Judges and Commissioners Association of Texas, and Brief, on Petitioners, Dallas County, et al., by depositing the same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

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on Respondent Carl Thomas by depositing same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the courts below, at the address indicated, to-wit:

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on Respondents, Robert Collins, et al., by depositing same in the United States Mail, with first-class postage prepaid,

addressed to the following Counsel of Record in the Courts below, at the address indicated, to-wit:

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JEFF R. BOGGESS

SUBSCRIBED AND SWORN TO ME before me by the said JEFF R. BOGGESS on this the day of December, 1981.

Notary Public, Tarrant
County, Texas

Amicus Brief

2

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No. 81-990

In The

Supreme Court of the United States

October Term, 1981

DALLAS COUNTY, TEXAS, ET AL.,

Petitioners,

v.

CARL THOMAS, SHERIFF,

Respondent,

v.

ROBERT COLLINS, ET AL.,

Respondents.

BRIEF OF AMICUS CURIAE, TARRANT COUNTY, TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
LIST OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. A TEXAS COUNTY CANNOT BE HELD LIABLE FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 1988, WHERE IT HAS NOT BEEN EXPRESSLY NAMED A PARTY DEFENDANT	5
A. FEDERAL LAW DIRECTS THAT THE ISSUE OF WHETHER A COUNTY-LEVEL OFFICER HAS THE CAPACITY TO REPRESENT HIS COUNTY AS A SURROGATE DEFENDANT MUST BE DETERMINED BY TEXAS LAW	5
B. TEXAS LAW PROHIBITS RECOVERY AGAINST A TEXAS COUNTY WHERE IT HAS NOT BEEN NAMED A PARTY DEFENDANT	7
C. MONELL AND ITS PROGENY DO NOT SUPERSEDE RULE 17(b), FEDERAL RULES OF CIVIL PROCEDURE	7
D. PLAINTIFFS CANNOT RECOVER ATTORNEYS' FEES UNDER § 1988 AGAINST A GOVERNMENTAL BODY WHERE THEIR PLEADINGS FAIL TO STATE A CLAIM AGAINST THE ENTITY UNDER § 1983	10

TABLE OF CONTENTS — (Continued)

Page

II. A TEXAS COUNTY CANNOT BE HELD LIABLE UNDER § 1983 FOR IMPERMISSIBLE EMPLOYMENT DECISIONS OF A SHERIFF 12

A. TEXAS SHERIFFS ARE STATE OFFICERS 12

B. IMPERMISSIBLE EMPLOYMENT DECISIONS OF A TEXAS SHERIFF MUST BE DEEMED TO BE IN EXECUTION OF OFFICIAL STATE POLICY, NOT COUNTY POLICY 13

1. Monell Rule Does Not Apply to Local Governments Which are Mere "Arms of the State." 13

2. If Any Governmental Entity Should Bear Liability for a Texas Sheriff's Conduct, It Should Be the Entire State of Texas, Not Dallas County 15

CONCLUSION 19

PROOF OF SERVICE 20

LIST OF AUTHORITIES

Page

Cases

Aetna Casualty & Surety Company v. Flowers, 330 U.S. 464 (1947) 8

Alabama v. Pugh, 438 U.S. 781 (1978) 7

Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966) *vacated on other grounds*, 390 U.S. 474 (1968) 15

Baxley v. Rutland, 409 F.Supp. 1249 (M.D. Ala. 1976) 6

Canales v. Laughlin, 147 Tex. 169, 214 S.W.2d 451 (1948) 14

Canister Co. v. Leahy, 182 F.2d 510 (3rd Cir. 1950) 9

Childress County v. Sachse, 310 S.W.2d 414 (Tex. Civ. App. — Amarillo 1958, writ ref'd. n.r.e., 158 Tex. 371, 312 S.W.2d 380) 7

Clarke v. Finley, 93 Tex. 171, 54 S.W. 343 (1899) 12

Conley v. Gibson, 355 U.S. 41 (1957) 11, 12

Connor v. Zackry, 117 S.W. 117 (Tex. Civ. App. 1909) 13

Dandridge v. Williams, 397 U.S. 471 (1970) 8

Davis v. Wildenthal, 241 S.W.2d 620 (Tex.Civ. App. — El Paso 1951, writ ref'd. n.r.e.) 7

Doe v. Sullivan, 472 F.Supp. 975 (W.D. Tex. 1979) 8, 13, 14

Ellis v. City of Chicago, 478 F.Supp. 333 (N.D. Ill. 1979) 12

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980) 15, 16

Gozdanovic v. Civil Service Commission, 361 F.Supp. 504 (W.D. Pa. 1973) 11

Harris v. Nelson, 394 U.S. 286 1969) 8

Hoover v. United States, 253 F.2d 266 (10th Cir. 1958), *cert. denied*, 356 U.S. 960 10

Hutto v. Finney, 437 U.S. 678 (1978) 8

LIST OF AUTHORITIES — (Continued)

	Page
Jernigan v. Finley, 90 Tex. 205, 38 S.W. 25 (1896)	13
John R. Alley & Co., Inc. v. Federal National Bank, 124 F.2d 995 (10th Cir. 1942)	8
Koch v. Yunich, 533 F.2d 80 (2nd Cir. 1976)	11
Lombardi v. Peace, 259 F.Supp. 222 (S.D. N.Y. 1966)	7
Miller v. El Paso County, 136 Tex. 370, 150 S.W.2d 1000 (1941)	14
Moncrief v. Gurley, 609 S.W.2d 863 (Tex. Civ. App. — Ft. Worth 1980, writ ref'd. n.r.e.)	12
Monell v. Department of Social Services, 436 U.S. 638 (1978)	passim
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)	8
Murray v. Harris, 112 S.W.2d 1081 (Tex. Civ. App. — Amarillo 1938), writ dism'd.)	14
Owens v. City of Independence, Mo., 455 U.S. 622 (1980)	16
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959)	8
Ex parte Preston, 72 Tex. Crim. 77, 161 S.W. 115 (1913)	13
Quern v. Jordan, 440 U.S. 332 (1979)	7
Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980)	16
Roach v. Kligman, 412 F.Supp. 521 (E.D. Pa. 1976)	11
Robbins v. Limestone County, 114 Tex. 345, 268 S.W. 915 (1925)	15
Rodriguez v. Medical Arts Hospital, 437 F.2d 1203 (5th Cir. 1971)	14

LIST OF AUTHORITIES — (Continued)

	Page
Scott v. Graham, 156 Tex. 97, 292 S.W.2d 324 (1956)	7
Smith v. Ambrogio, 456 F.Supp. 1130 (D. Conn. 1978)	12
Trader v. Flat Distributors, 476 F.Supp. 1194 (D.Del. 1979)	11
Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980), *cert. denied*, 101 S.Ct. 577	12
United States v. Ballard, 322 U.S. 78 (1944)	8
Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981) (en banc)	2, 8
Wiesenfeld v. New York, 474 F.Supp. 1141 (S.D. N.Y. 1979)	17
Wise v. Lipscomb, 437 U.S. 535 (1978)	8
Constitutions	
United States Constitution	
Eleventh Amendment	passim
Texas Constitution	
Article V, Section 23	12
Statutes	
United States Statutes	
42 U.S.C. § 1983	passim
42 U.S.C. § 1988	5, 10, 11, 19
Texas Statutes	
Vernon's Annotated Texas Statutes, Art. 6866	13
Vernon's Annotated Texas Statutes, Art. 6869	14, 15
Vernon's Annotated Texas Statutes, Arts. 6865 — 6877-4	13
Vernon's Texas Code of Criminal Procedure	13
Vernon's Texas Education Code, § 4.28	16

LIST OF AUTHORITIES — (Continued)

Page

Rules

Federal Rules of Civil Procedure, Rule 17(b) 6, 7, 8, 9

Texas Rules of Civil Procedure, Rule 33 ..... 7, 8

Others

Saranello and Griffiths, *Pleading Municipal Liability in Police Misconduct Actions*, 44 TEX. B.J. 1339 (Dec. 1981) 12

15 TEX. JUR. 2d, *Counties*, § 49 (1960 and 1981 Supp.) 13

5 Wright and Miller, Federal Practice and Procedure, § 1234 (1969) 10

6 Wright and Miller, Federal Practice and Procedure, § 1559 (1971) 6

13 Wright and Miller, Federal Practice and Procedure, § 3524 (1975) 8

No. 81-990

In The

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DALLAS COUNTY, TEXAS, ET AL.,

Petitioners,

v.

CARL THOMAS, SHERIFF,

Respondent,

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ROBERT COLLINS, ET AL.,

Respondents.

BRIEF OF AMICUS CURIAE, TARRANT COUNTY, TEXAS, IN SUPPORT OF PETITIONERS', DALLAS COUNTY, ET AL., APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, TARRANT COUNTY, TEXAS, an agency and political subdivision of the State of Texas (hereinafter referred to as "*Amicus Curiae*"), and files this, its Brief in Support of Petitioners', Dallas County, et al., Application for Writ of Certiorari, and would respectfully show as follows:

INTEREST OF AMICUS CURIAE

Amicus curiae is an agency (i.e., county) of the State of Texas, as is one of the Petitioners in this cause, Dallas County, Texas. *Amicus* was one of several *amici* that appeared before the United States Court of Appeals for the Fifth Circuit in the recently decided case of *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc) and there presented many of the same arguments that it makes today before this Court. The interest of *amicus* is simply the desire that its taxpayers not be held responsible in any fashion for the conduct of a state officer over whom neither the county nor its residents have any control.

This Brief demonstrates that the law already recognizes the legal principles behind this interest. While not directly adopting the statement of issues made by Petitioners, Dallas County, et al., this Brief supports the principles embraced by Petitioners' Issues Nos. II and III. Petitioners' Brief for Certiorari at i.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case presented by Petitioners, Dallas County, et al., in their Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

I.

Under Federal Law, Carl Thomas' and Dallas County's Capacity To Be Sued Is Determined by Texas Law. Rule 17(b), Federal Rules of Civil Procedure, states that whether an individual defendant may be sued in a particular capacity shall be determined by the law of his domicile. This same Rule provides that the capacity of a governmental entity to be sued shall be determined by the law of the State in

which the District Court sits. Since Sheriff Carl Thomas is a Texas domiciliary, and Dallas County is a division of the State of Texas, Texas law governs the issue of the defendant's capacity to be sued in this action.

Under Texas law, Carl Thomas Is Incapable of Serving as a Surrogate Defendant for Dallas County. The Fifth Circuit treated this action against "Carl Thomas, Sheriff" as one against Dallas County itself. The Texas Rules of Civil Procedure, adopted in this instance as surrogate federal law by the Federal Rules of Civil Procedure, prescribe that a suit against a Texas county must be brought directly against the county in its own name. A county-level officer in Texas is thus incapable of serving as the alter ego of his county in litigation brought against the county's interests.

***Monell* and Its Progeny Have Not Superseded Rule 17(b), Federal Rules of Civil Procedure.** It cannot be contended that by its decision in *Monell v. Department of Social Services*, the Supreme Court created an exception to Rule 17(b) holding that a government officer always has the capacity to act as a surrogate litigant for his governmental entity when he is sued in a civil rights case. This notion must be rejected because this Court has previously held that it cannot amend the Federal Rules of Civil Procedure by judicial decision.

Under Federal Law, the Plaintiffs' Pleadings Fail to State a Claim Against Dallas County. The Federal Rules of Civil Procedure require plaintiffs to plead "a short and plain statement" of their claim sufficient to give the defendant "fair notice" of what the plaintiff's claim is and the grounds upon which it rests. The plaintiffs in the instant case failed to comply with this requirement with respect

to Dallas County. There was absolutely no pleading whatever linking Dallas County, as distinguished from Carl Thomas, to any ground of liability to the plaintiffs.

II.

Texas Sheriffs Are State, Not County, Officers. Well established Texas law holds squarely that a County Sheriff is not an officer of a county, but of the State of Texas itself. As an independently elected officer, all of his duties, powers and authority emanate from State, not local, law.

Texas Counties Are But Arms of the State and Do Not Come Within the Scope of § 1983 Liability of Local Governments As Defined in *Monell*. State law flatly holds Texas counties to be but mere local administrative uints of the State of Texas. This principle has been recognized by federal courts and has already been used to grant Eleventh Amendment immunity status to these units of government. The scope of § 1983 liability for municipalities announced by this Court in *Monell v. Department of Social Services*, by its own express limitations, therefore does not apply to Texas counties.

If Any Government Is Responsible to the Plaintiffs, It Should Be the Entire State of Texas, Not Dallas County. The official policy of the State of Texas allowed Carl Thomas to make the personnel decisions challenged in the case at bar. Dallas County had absolutely no control over Sheriff Thomas' actions. Federal decisions, including authority decided by this Court, hold that Dallas County should not bear responsibility under these circumstances and that, if any governmental entity should be held accountable to the plaintiffs for Carl Thomas' conduct, it should be the entire State of Texas.

ARGUMENT

I. A TEXAS COUNTY CANNOT BE HELD LIABLE FOR ATTORNEYS' FEES UNDER 42 U.S.C. § 1988, WHERE IT HAS NOT BEEN EXPRESSLY NAMED A PARTY DEFENDANT.

In the case at bar, the Court of Appeals affirmed the District Court's judgment against Carl Thomas "in his official capacity" and the lower court's order directing that payment of an award of the plaintiffs' attorney's fees be paid with funds possessed by Dallas County. These lower courts entered these judgments even though: (1) Carl Thomas was *not* sued "in his official capacity," (2) Dallas County was *not* named a party defendant to the lawsuit, and (3) the plaintiffs did *not* plead or prove that Carl Thomas' actions were taken in execution of the official policy or custom of the county or that his conduct might fairly be said to represent the official policy or custom of Dallas County. As will be demonstrated in this brief, these holdings are fundamentally erroneous.

A. FEDERAL LAW DIRECTS THAT THE ISSUE OF WHETHER A COUNTY-LEVEL OFFICER HAS THE CAPACITY TO REPRESENT HIS COUNTY AS A SURROGATE DEFENDANT MUST BE DETERMINED BY TEXAS LAW.

Relying on its decision in *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981, *petition for cert. filed*, No. 81-989), a companion case decided the same day as the instant case, the Fifth Circuit held that where a county-level officer of a Texas county is named as a party defendant, a judgment against that defendant may be satisfied with funds possessed by the county even though it was not named a defendant

in the action. Thus, the Court of Appeals impliedly held that a county-level officer has the capacity to act as a surrogate litigant on behalf of his county and/or that a Texas county has the capacity to be sued through one of its officers. The Court necessarily made this implied holding on the issue of capacity, since "[g]enerally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and, typically, is determined without regard to the particular claim or defense being asserted." 6 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1559, at 727-28 (1971). In the case at bar, the Fifth Circuit implicitly determined that Sheriff Carl Thomas possessed sufficient "personal qualifications" to allow him "to litigate" on behalf of Dallas County, as well as himself.

This determination was simply wrong. Rule 17(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the District Court is held...

FED. R. CIV. P. 17(b). Applying this rule to the instant case, one need look only to Texas law, since Texas is both the domicile of Sheriff Thomas and the State in which the District Court sat. State law must determine whether a governmental officer within that state has the capacity to serve as a surrogate litigant for his governmental entity in a federal court action. *Baxley v. Rutland*, 409 F.Supp. 1249 (M.D. Ala. 1976) (per Rives, Circuit Judge). Moreover,

Rule 17(b) has been employed routinely to resolve issues of capacity in civil rights actions by adoption of applicable state law. *See, e.g., Lombardi v. Peace*, 259 F.Supp. 222 (S.D. N.Y. 1966).

B. TEXAS LAW PROHIBITS RECOVERY AGAINST A TEXAS COUNTY WHERE IT HAS NOT BEEN NAMED A PARTY DEFENDANT.

When one looks to Texas law to determine whether an action may be maintained against a county through a lawsuit filed against one or more county-level officers, the answer is clear. Rule 33 of the Texas Rules of Civil Procedure flatly states, "Suits by or against a county or incorporated city, town or village shall be in its corporate name." TEX. R. CIV. P. 33. This rule of Texas procedure is firmly embedded and has been invoked repeatedly by Texas Courts to deny plaintiffs relief against a county where the suit was maintained only against county-level officers. *See, e.g., Scott v. Graham*, 156 Tex. 97, 292 S.W.2d 324 (1956); *Childress County v. Sachse*, 310 S.W.2d 414 (Tex. Civ. App.—Amarillo 1958, writ ref'd. n.r.e., 158 Tex. 371, 312 S.W.2d 380); *Davis v. Widenthal*, 241 S.W.2d 620 (Tex.Civ. App—El Paso 1951, writ ref'd. n.r.e.). Accordingly, the District Court and the Court of Appeals erred when they over-looked Federal Rule 17(b) and Texas Rule 33 and granted an award of attorneys' fees against Dallas County.[1]

[1] Although *amicus* notes that this Court has previously held that a governmental entity entitled to claim Eleventh Amendment immunity may not be sued directly in its own name in federal court, *see, e.g., Quern v. Jordan*, 440 U.S. 332 (1979); and *Alabama v. Pugh*, 438 U.S. 781 (1978), *amicus* submits that Rule 33 of the Texas Rules of Civil Procedure does not indicate that Texas counties are not entitled to this constitutional defense or that the State of Texas has consented to suits against its counties in federal court, thereby waiving the Eleventh Amendment defense.

C. MONELL AND ITS PROGENY DO NOT SUPERSEDE RULE 17(b), FEDERAL RULES OF CIVIL PROCEDURE.

It might be contended that this Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978),

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Amicus submits that, under the criteria established by this Court and lower federal courts, Texas counties may properly claim Eleventh Amendment protection. *See Doe v. Sullivan*, 472 F.Supp. 975 (W.D. Tex. 1979); *compare, Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). The Fifth Circuit itself has indicated that such protection may indeed be appropriate. *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981 (en banc).

Rule 33, requiring suits against Texas counties to be brought against the governmental body itself, is a procedural rule promulgated for use in Texas courts by the Texas Supreme Court. A *procedural* rule fashioned by a court for use in state courts should not be deemed as a waiver of a *substantive* defense available in federal court. Indeed, Rule 17(b) is a procedural rule and cannot be construed, even by its adoption of a state procedural rule, to effect, abridge or modify the substantive rights of Dallas County under the Eleventh Amendment. *John R. Alley & Co., Inc. v. Federal National Bank*, 124 F.2d 995 (10th Cir. 1942). But even if Rule 17(b) could be construed as permitting an interpretation that Rule 33 of the Texas Rules had impliedly waived a county's Eleventh Amendment protection, it must be remembered that implied waivers of Eleventh Amendment protection are not favored. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *see also* cases cited in 13 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3524 at 79, n. 14 (1975). Of course, the applicability of this constitutional defense is not directly before the Court in the instant case, inasmuch as Dallas County, in a proper case, could be held liable for payment of a prevailing plaintiff's attorneys' fees, notwithstanding the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678 (1978).

Amicus respectfully submits that a remand of this case to the Court of Appeals to decide these interrelated issues of capacity and constitutional immunity may be desirable so that this Court can have the benefit of the Fifth Circuit's views on these issues, which are necessarily dependent upon the intricacies of Texas law. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535 (1978); *Dandridge v. Williams*, 397 U.S. 471, 475, n. 6 (1970); *Aetna Casualty & Surety Company v. Flowers*, 330 U.S. 464, 468 (1947); *United States v. Ballard*, 322 U.S. 78, 88 (1944).

impliedly held that Rule 17(b) does not apply in civil rights actions against government officers who are named as defendants "in their official capacities." It could be argued that, in *Monell*, where there were individual defendants who had been sued in their "official capacities," the Court impliedly held that a government officer, when sued in such a capacity, *always* has the "capacity" to represent the interests of his government as a surrogate litigant, "at least where Eleventh Amendment considerations do not control analysis." *Monell v. Department of Social Services, supra,* at 690, n. 55.

Such a reading of *Monell* seems erroneous, however, because in that case this Court never referred to Rule 17(b) or the "capacity" of a defendant to be sued. Such an argument must be rejected because it seems virtually certain that, if this Supreme Court had intended in *Monell* to carve out an exception to one of the Federal Rules of Civil Procedure, the Court would have expressly announced such an holding. *See, Harris v. Nelson,* 394 U.S. 286, 298 (1969) (Supreme Court has "no power to rewrite the Rules [of Civil Procedure] by judicial interpretations."); *see also, Canister Co. v. Leahy,* 182 F.2d 510, 514 (3rd Cir. 1950) (Federal Rules "must be adhered to."). In any event, even if this Court had made such a ruling, the plaintiffs in this case would not be able to come within its scope, inasmuch as the plaintiffs did *not* sue Carl Thomas "in his official capacity." On the contrary, the plaintiffs merely designated the office which the defendant held at the time this action was instituted. Relief against a governmental entity should be denied when a plaintiff, through his designation of the parties defendant, gives no clue that he seeks recovery from the entity itself. Moreover, again assuming *arguendo* that the *Monell* Court did make such an implied holding, such

a rule would not apply to this case because here "Eleventh Amendment considerations *do* . . . control analysis."

D. PLAINTIFFS CANNOT RECOVER ATTORNEYS' FEES UNDER § 1988 AGAINST A GOVERNMENTAL BODY WHERE THEIR PLEADINGS FAIL TO STATE A CLAIM AGAINST THE ENTITY UNDER § 1983.

Relief against a governmental entity must also be denied when a plaintiff gives no indication in his pleadings that he seeks recovery from the entity. In the instant case, the plaintiffs failed to plead or prove that the actions of Sheriff Thomas were taken in execution of official Dallas County policy or custom, or that Sheriff Thomas' acts could "fairly be said to represent" the official policy of the county, as required by *Monell* to establish liability against an entity. Given this failure, Dallas County has had no opportunity to assert any defenses to the plaintiffs' tardy claim upon it; therefore, no relief can be given the plaintiffs against Dallas County because there is no pleading on file connecting any conduct of Dallas County to the plaintiffs' damages. *Hoover v. U.S.*, 253 F.2d 266 (10th Cir. 1958), *cert. denied*, 356 U.S. 960; 5 WRIGHT and MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1234 (1969).

Moreover, the fact that the plaintiffs were represented by counsel in this case, as opposed to proceeding *pro se*, is also significant in viewing the defective pleadings. It has been held:

> [I]t is well established . . . that civil rights complaints, especially those drafted by experienced counsel, must set forth with specificity the acts of *each* defendant that are alleged to have violated the plaintiff's civil rights.

Trader v. Flat Distributors, 476 F.Supp. 1194 (D.Del. 1979) (emphasis added); *accord*, *Roach v. Kligman*, 412 F.Supp. 521 (E.D. Pa. 1976); *Gozdanovic v. Civil Service Commission*, 361 F.Supp. 504 (W.D. Pa. 1973); *c.f.*, *Koch v. Yunich*, 533 F.2d 80 (2nd Cir. 1976) (held that complaint based on civil rights statutes must contain specific allegation of facts showing deprivation of civil rights). Indeed, where a plaintiff has chosen expressly to exclude a potential defendant in a civil rights action, that party cannot be said to be a party defendant. *Gozdanovic v. Civil Service Commission*, *supra*. This rule is nothing more than a logical extension of the well-established principle, laid down by this Court twenty-four years ago, that the Federal Rules of Civil Procedure require a plaintiff to plead " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The plaintiffs' failure to plead and prove that Sheriff Thomas' challenged actions were taken in execution of an official policy or custom of Dallas County or that he possessed sufficient authority so that his acts alone could represent such official policy is critical in reviewing the propriety of an award of attorneys' fees against the county. No one may be ordered to pay attorneys' fees under 42 U.S.C. §1988 unless the conduct of such person or entity would subject them to liability directly under one of the statutes specifically enumerated in § 1988. 42 U.S.C. § 1988 (1970). In referring to the Civil Rights Attorney's Fee Reward Act of 1976 (codified as 42 U.S.C. § 1988), this Court recognized this principle when it held that the Act "allows prevailing parties (in the discretion of the Court) in § 1983 suits to obtain attorneys' fees *from the losing parties*." *Monell v. Department of Social Services*, *supra*, at 698-99 (emphasis

added). Yet, although the plaintiffs pled and proved a § 1983 claim against Carl Thomas, the county cannot be held vicariously liable under § 1983 on a theory of *respondeat superior* on the basis of this pleading and evidence. *Id.* Inasmuch as the plaintiffs' pleadings and proof failed to give Dallas County *any* notice of the plaintiffs' claim against it, the Fifth Circuit erred as a matter of law when it affirmed the District Court's award of attorneys' fees running against the entity itself. *Conley v. Gibson, supra; see also, Smith v. Ambrogio,* 456 F.Supp. 1130, 1134, n. 3 (D. Conn. 1978) (held *Monell* applies to a municipal defendant with a single challenged official policy "as long as the *pleaded* facts support the inference that unconstitutional action was taken . . . pursuant to such policy"), quoted in *Turpin v. Mailet,* 619 F.2d 196, 202 (2nd Cir. 1980), *cert. denied* 101 S.Ct. 577 (emphasis added); *Ellis v. City of Chicago,* 478 F.Supp. 333 (N.D. Ill. 1979); *see generally,* Saranello and Griffiths, *Pleading Municipal Liability in Police Misconduct Actions,* 44 TEX. B.J. 1339 (Dec. 1981).

II. A TEXAS COUNTY CANNOT BE HELD LIABLE UNDER § 1983 FOR IMPERMISSIBLE EMPLOYMENT DECISIONS OF A SHERIFF.

A. TEXAS SHERIFFS ARE STATE OFFICERS.

For more than eighty years, Texas law has held Sheriffs to be officers of the State itself, and not county officers. *Clarke v. Finley,* 93 Tex. 171, 54 S.W. 343 (1899). The office is created by the State Constitution. TEX. CONST. Art. V, § 23. The office cannot be modified or abolished by the will of the local electorate in any individual county, save by statewide referendum. *C.f., Moncrief v. Gurley,* 609 S.W.2d 863, 866 (Tex. Civ. App. — Ft. Worth 1980, writ ref'd. n.r.e.)

(Massey, C.J., concurring). The duties and powers of the office are all specifically established by state statute and not by local county ordinances TEX. REV. CIV. STAT. ANN. arts. 6865 — 6877-4 (Vernon 1960 and Vernon Supp. 1980-81); *see generally* TEX. CRIM. PRO. CODE ANN. Indeed, a state statute, not any local ordinance, requires a Sheriff to post a bond conditioned on his performance of official duties and good behavior, and this bond is payable to the Governor of Texas, not to any locally elected official. TEX. REV. CIV. STAT. ANN. art. 6866 (Vernon 1960).

Nor is the Sheriff's status as a state officer unique among county-level officers in Texas. Other such officers have long been recognized as state officers as well. *See, e.g., Fears v. Nacogdoches County*, 71 Tex. 337, 9 S.W. 265, 266 (1988) (Justice of the Peace "though sometimes called a county or precinct officer, . . . is an officer of the State, and not for the County."); *Jernigan v. Finley*, 90 Tex. 205, 38 S.W. 25 (1896) (County Treasurer); *accord, Connor v. Zackry*, 117 S.W. 117 (Tex. Civ. App. 1909); *see generally, Ex parte Preston*, 72 Tex. Crim. 77, 161 S.W. 115 (1913); 15 TEX. JUR. 2d, *Counties* § 49 (1960 and 1981 Supp.). The status of a Texas Sheriff as a State officer has already been acknowledged by the federal judiciary. *Doe v. Sullivan, supra.*

B. IMPERMISSIBLE EMPLOYMENT DECISIONS OF A TEXAS SHERIFF MUST BE DEEMED TO BE IN EXECUTION OF OFFICIAL STATE POLICY, NOT COUNTY POLICY.

1. *Monell* Rules Does Not Apply to Local Governments Which Are Mere "Arms of the State."

Nowhere is the official policy of the State of Texas more clearly expressed than in the general statutes enacted by

the Texas Legislature. Article 6869, Texas Revised Civil Statutes, vests virtually unbridled discretion in every Sheriff to employ and discharge deputies at "the pleasure of the Sheriff." It must be said, therefore, that the official policy of the State of Texas is to give almost total authority over personnel decisions concerning county deputy sheriffs to the Sheriff elected in that county. *Murray v. Harris*, 112 S.W.2d 1081 (Tex. Civ. App. — Amarillo 1938, writ dism'd).

Monell, of course, established that a local government *not entitled to claim Eleventh Amendment immunity* can be held liable *only* where one of its officers, employees or agents deprives an individual of his federal rights, while executing an official policy or custom *of the local government itself*, or where the impermissible conduct is that of someone whose acts may fairly be said to represent the official party or custom *of the local government. Monell v. Department of Social Services, supra.*

It is submitted that, under this rule, Dallas County cannot be held liable for the conduct of Sheriff Carl Thomas for two reasons. First, Dallas County is but an arm of the State of Texas and is, therefore, entitled to Eleventh Amendment immunity. *Doe v. Sullivan, supra,; c.f., Rodriguez v. Medical Arts Hospital*, 437 F.2d 1203, 1204 (5th Cir. 1971) (held that "in Texas, counties are political subdivision of the State operating solely and exclusively as a governmental agency" of the State); *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948) (counties have no powers other than those expressly conferred on them by Texas Constitution and statutes); *Miller v. El Paso County*, 136 Tex. 370, 150 S.W.2d 1000 (1941) (Texas county is but "mere" division of the State and can only perform governmental functions);

Robbins v. Limestone County, 114 Tex. 345, 268 S.W. 915, 919 (1925) (held that State of Texas actually owns all property in possession of counties, and Legislature "may exercise dominion and control over it without the consent of the county and without compensating the county for it"); *see also, Avery v. Midland County*, 406 S.W.2d 422 (Tex. 1966), *vacated on other grounds*, 390 U.S. 474 (1968). Accordingly, the rule of liability announced in *Monell* expressly does not apply to Dallas County. *Monell v. Department of Social Services, supra*, n.54 at 690.

2. If Any Governmental Entity Should Bear Liability for a Texas Sheriff's Conduct, It Should Be the Entire State of Texas, Not Dallas County.

The second reason Dallas County cannot be held liable under § 1983 for the conduct of Sheriff Thomas in the instant case is that his conduct as a state officer in no manner executed the official policy or custom of Dallas County. Even if the Sheriff acted improperly in making personnel decisions with regard to the plaintiffs, such conduct was taken pursuant to the official policy of the State of Texas, which was to give the Sheriff the widest possible authority in personnel matters. *See, Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). Therefore, because the county could not have prevented Sheriff Thomas' actions, taken under the authority of Article 6869, Texas Revised Civil Statutes, "the citizens of . . . [Dallas] county should not bear singular responsibility" for his conduct. *Id.* at 404. Indeed, if any governmental entity should be called upon to bear responsibility for Sheriff Thomas' acts, it should be the entire State of Texas, whose unbridled grant of statutory power to Sheriff Thomas may fairly be said to have "caused" any damages the plaintiffs may have suffered, inas-

much as Article 6869 permitted Carl Thomas to take the actions he did. Indeed, as this Supreme Court has held, "Elemental notions of fairness dictate that one who causes a loss should bear the loss." *Owens v. City of Independence, Mo.*, 445 U.S. 622, 654 (1980). The converse of this principle is, of course, that elemental notions of fairness require that a party whose conduct causes no damage should not be called upon to bear any loss. It is respectfully submitted that Dallas County caused no injuries to the plaintiffs in this case.

The distinction between liability being imposed on an official under § 1983 and liability being imposed on his governmental entity as the result of his conduct has been recognized by numerous courts since *Monell*. For example, in *Familias Unidas v. Briscoe, supra.*, a Texas county judge had exercised his power under § 4.28 of the Texas Education Code, which vested in county judges the authority to require any organization deemed to be interferring with public school operations to disclose its membership. Although the Fifth Circuit struck down the statute as being unconstitutional, the Court held that the judge's conduct did not "represent the official policy of Medina County" because he was executing State policy. *Id.* at 404.

The distinction was again recognized by the Fifth Circuit in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980). In *Rheuark*, three criminal defendants who had been convicted in state district court in Dallas County and who were incarcerated pending appeal brought a § 1983 action against the county, its commissioners, the state district judge who had presided over their trials and the court reporter who had reported the trial. The plaintiffs alleged that they were being denied their liberty because of lengthy delays in the

transcription of their trials. The delays were caused by a shortage of court reporters, and the county commissioners had written the district judges in the county requesting them to curtail the appointment of additional reporters, even though the commissioners were aware of lengthy delays. Texas law requires a county to pay the court reporters' salaries, but state district judges have independent power to appoint such reporters as are necessary and to set their salaries. The Fifth Circuit concluded that, notwithstanding the commissioners' action, the defendant state district judge was the party chiefly responsible for the plaintiffs' plight, since he had not appointed additional reporters. The Court, therefore, concluded that Dallas County, which had no authority over the district judge's appointments, was not liable.

The distinction was also recognized in *Wiesenfeld v. New York*, 474 F.Supp. 1141 (S.D. N.Y. 1979). In *Wiesenfeld*, the plaintiffs' complaint arose because their husband and father had been ordered to increase his weekly child support payments in favor of a child by his first wife by a State Family Court of the State of New York in a proceeding of which the plaintiffs had not been given notice. The plaintiffs contended that this judicial order would cause them to suffer direct financial and economic hardship. The plaintiffs sued the State of New York, the trial judges involved in the issuance and enforcement of the support orders and the City of New York, whose mayor had appointed the defendant judges of the state courts pursuant to New York State law. The District Court detailed how the actions of the defendant judges had been taken pursuant to their authority under State law and dismissed the claim against the City, noting that its only nexus with the plaintiffs was the fact that its mayor had merely appointed

the State officials whose complained of acts were taken pursuant to state law. To find the City liable under these circumstances, the Court held, would be a finding of liability solely on the basis of *respondeat superior*, which was proscribed by *Monell*.

Clearly, the instant case is no different than *Familias Unidas*, *Rheuark* and *Wiesenfeld* with respect to the absence of any liability on the part of the local government under § 1983. Even though the voters of the local county had elected the county judge in *Familias Unidas* and the district judge in *Rheuark* and even though the voters of the City of New York had elected the City's mayor, who in turn appointed the state trial judges in *Wiesenfeld*, none of the local entities were held liable for any wrongful conduct in these cases. The reason for these holdings is that the officials whose acts were challenged had simply been executing state laws and policies at the time their questioned conduct occurred. This is precisely the situation in the case at bar. To impose liability on Dallas County in the instant case is to establish liability simply because the county employed a tortfeasor. Such liability cannot be imposed. *Monell v. Department of Social Services, supra.*

CONCLUSION

Amicus curiae prays that the Judgment of the Court of Appeals imposing liability upon Dallas County under 42 U.S.C. §§ 1983 and 1988 be reversed.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF TEXAS }
COUNTY OF TARRANT }

BEFORE ME, the undersigned Notary Public in and for Tarrant County, Texas, on this day personally appeared TIM CURRY, who, being by me duly sworn, upon oath stated:

I, TIM CURRY, am a member of Bar of the Supreme Court of the United States and, contemporaneously with the filing of this Brief of Amicus Curiae, Tarrant County, Texas, have tendered an Entry of Appearance to the Court.

I further state upon oath that, on the ..... day of December, 1981, in compliance with Rule 28(3) and (5), Rules of the Supreme Court of the United States, I served copies of the foregoing Brief of Amicus Curiae, Tarrant County, Texas, on Petitioners, Dallas County, et al., by depositing the same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

EARL LUNA, ESQ.
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on Respondent Carl Thomas by depositing same in the United States Mail, with first-class postage prepaid, addressed to the following Counsel of Record in the United States Supreme Court, at the address indicated, to-wit:

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TIM CURRY

SUBSCRIBED AND SWORN TO ME before me by the said TIM CURRY on this the day of December, 1981.

Notary Public, Tarrant
County, Texas